Institutes of the Lawes

OF

ENGLAND,

Digested into the Method of the Civill or Imperial Institutions.

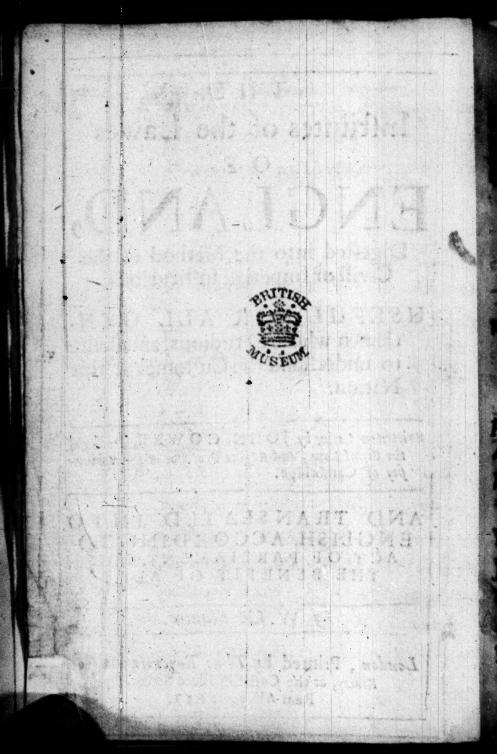
useful for ALL GENtlemen who are studious, and defire to understand the Customes of this Nation.

written in Latine by JOHN CQWEL, Doctor of the Civill Law, and Regius Projessor in the Univerfity of Cambridge.

AND TRANSLATED INTO ENGLISH, ACCORDING TO ACT OF PARLIAMENT, FOR THE BENEFIT OF ALL.

By W.G. Esquire.

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THE PREFACE.

is so well knowne to this present Age, that it were to little
purpose for me to imagine, that what I
m able to say, would add any thing to
is Glory. Only this, his too much crying up Parliament Priviledges, rendred
im not so much a favourite of those
or his Bookes so vendible as they have
en since these late changes in Engand: And therefore though this Incaall

The Preface.

tife be of the Lawes of England, find bimselfe was so good a Common wealth man, I bope, for the Authors Sake it will find no less acceptance in the English World, then if he had lived to mayn taine what he in that Age durst avon and thereby appeared in his owne naturall and proper colours. If in an thing I have erred in this Translation Charity can pardon me, especially when I shall affirme, that this was worke of Charity in my selfe (as I conceived) not to let so choyse a method of our English Lawes lye obscured in a language, which I know many of this Nation who were wel-willers to the Law could not understand; and to those only it is intended. And if it happen into any other hand, especially into such as bate

The Preface.

te the profession of the Law, I do no me regard their censure then they do be Laws Precepts, which our Author less us, are to live honestly, to do no inmy to any one, and to render every one their due.

Farewell.

THE

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and formation of the

. The First Review

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First Booke of the Institutes of the Lawes of ENGLAND.

of Juffice and Law.

TIT. I.

ustice is a constant and perpetually will of rendring unto exery one their Due. (a)

1. The knowledge or learn - c. 4. num. 2. ing of the Law, is a knowledge Flet. 1. 4. c. 1. of things both Divine and Humane, and a Science distin-

guishing what is just, what unjust. (b) (b) Bract. 1.

2. The Precepts of the Law are thele, To cod. nam. 4.
live honestly, to doe no injury to any one, and
to render every one their due. (c) (c) Id.cod. n

J. The Law is to be considered, either as 6.

publique or private: We call that the Law publique,

lique, which appertaineth to the very Constitution of a Common-wealth; and it confifteth in things holy, in Preists and Magistrates: For it is necessary for a Common-wealth to have Churches, in which men may addresse themselves to God, for the forgivenesse of their fins: It is also convenient to have Priests or Ministers, by whom we may be enjoyned repentance for our fins; and who may pray for us, and mediate to God on our behalfe, for his helpe and providence. And it is requifite likewife, That there be Magistrates ordained, because by the meanes of those who are appointed to precede as Judges, the Lawes may be put in execution; for it were to little purpole that there should be Lawes, if there were not some to go-

(d) Braft.'l.1. c. 5. num. 6.

verne by those Lawes. (d) 4. That which we terme Private Law, is that

which cheifly belongs to the utility of particular persons, and is secondarily necessary for a Common-wealth, That no one abuse his owne: And so on the other side, what is necessary for a Common-wealth, is likewise secundarily requi-

c.5 .num.3. Flet. 6. c.pri.

(e) Bract. 1.1. fite for the profit of particular persons : And this private Law hath three foundations. Viz.

Naturall, Nationall, and Civill. (e)

Of the Law of Nature and Nations, and the Law Civill.

TIT. 11.

HE naturall Law is that which nature, of (a) Bract. 1.1. rather God hath instilled into all Cresc.5. num.4. tures. (a) 1. The

i. The National Law or the Law of Nations, is that which all Nations observe, and which proceeds from the naturall Law, Because the naturall Law is that which is common to all creatures, either on the Earth, in the Sea, or in the Aire. (b) From the Law of Nation comes the conjuncti n of male and female. (c) And that which by common confent is called Matrimony. But this cannot properly be termed a Law, because it is corporated and may be seen, for Laws are incorporall, which difcend and are introduced by the custome of Nations: But from this Law proceeds the Procreation, and Education of Children. (d) And this Law of Nations is folcly common to man, as Religion towards God; that we may become affifting both to our Parents and Country, and repell Force and Injury. And from hence it comes, that whatolever we do for the Defence of our own Bodies is adjudged legall. (e) From the Law f Nations also are servitudes, (f) wars, ditinet and divided Nations, severall distinuishe Kingdomes and Dominions, Manumisons, fetting of bounds to Land, the building hich means we have our Cities, Borroughs, nd Villiages. And generally to this Law of Varions may be referred, all manner of con- (g) Id.1.1.c.5. racts, and many other things. (g)

2. The civill Law of England (usually illed Common Law) is, I'ohu'raper, and ath a threefold Acceptation. For first, it is ken generally for that Law which the Ento use, distinguished from that of the Ro-# 1115°

(b) Id.l.1.c.5. num.6.

(c) Plow. fol:

(d) Id.303.8c

(c) Bract. l. i. c.6. num.7. (f) Id. cod.

num. 6,7,8:

mians, and other Nations, Secondly, Itis

* Formerly Kings Bench. commonly called the "Upper Bench, and the Common, Bleas. For when we fay, the cognilance of any cause belongs to the Common Law, we did not intend to any Coun Baron, County Court, Pypowder Court, or any fuch Court, but to one of these two Judi catories, who do most strictly judge all cause according to the rule of the Common Law (b) Although there be many cases in which both in the Chancery and Fxchequer, Pro ecfs are issued upon Originalle Writs, and judgment given according to common Law, (1) And thirdly, It is taken for that Lar

(i) Plow.fol.9. (k) Cook, 1.3.

(h) Dott. &

Stu. 1.2.6.5. Eract.1.1.c.5.

num. 5.

fil. 86.

[m] Doct. & SIN.L. T.C.4.

which we tearn Statute Law (4) 3. The Law of England according to fom hath fix principall foundations, viz. The La [1] Plo.f. 316. of Reason, (1) the Divine Law, the general of fromes, of the Kingdome, certain principle and Maximes, particular Customes and Su tutes. (m)

But if we shall contract these more close we may fay the Law of England hath tw parts, Viz. Ancient Customes confirmed h the confent of the People, and [formerly the Kings Oath: And Statutes which a enacted by Parliament, either as Supple ments or amendments to the aforefayd Co flomes; both which are derived from the Law of Nature and Nations, as all other Lawes what foever, which are either inft reasonable; And thus wee firty divide of [n] Forte.c.13 Lawes into written and unwritten. (n)

There be others which make our La

t ho

three-fold. Vig. Common Law, Customes,

and Statutes. (e)

our written Law, at least tha twhich is inule, is contained in Statutes, (p) which were not made according to the Princes pleafure, but by the confent of the whole Realm called together [formerly] by the King, for this purpole, (4) yet we as [heretofore] the Kingsapprobation was necessarily requi-

wherefoever it reft, [as, in sinies past the King 7 is above the Lawes for that it may grant priviledges at pleafure, as to fingle perions, as to Corporations and Colledges, provided they become not injurious to a third perfon (r) In which if any douts arife, some lay it felf alone hath fole power of interpreting.(s) Although others ascribe this power also unto the Judges, that fuch Charrers may receive construction according to the sules of law.(1)

6. But sometimes it falls out, cafes arise [1] cook 1. 1. which are neither provided for, by customes or Statutes fufficiently. And there the Judg- woods. es dodecide by like reasons, proceeding accorcording to former Precedents: And for that purpole did many times meet together to argue fuch cafes. (w) But if any fuch difficulty, of the Law, tit. chances to happen which requires a higher Demurrer. fearch, then judgment is recited untill the [w] Brack. 1.1. next Parliament, by the councell of which Court it is determined. (w)

7. The unwritten Law confifts of ancient customes of the Realme which are observed for Law(x) and to the observation of which our cook !. 4.fo.2 I

[p] Cook, 1.3.

[9] Fortef.c.g.

[s] Bract. 1.2. 6.16.num.3. Brit. 6.62. Flet.1.32.14.

Surview terms c. 2. num .7. [x] Bract. 1.1. 6.3. mim. 2. Littl.l.2. c. 10. Kings:

[2] Doct. Stu. 1.2.6.5 . Plow. 465.

[y] Fort.c.34. Kings at their coronations were obliged, (y) by Oath; notwithstanding any of these customes may be altered or nulled by a Statute. (3) A custome is either generall or particuler. A generall custome is that which is observed through the whole Realme, and is more properly tearmed by us a common [a] Bract. I. I. Right. (a) A particuler is that which is in

3. num. 5.

[b] Cook 1.4. fol. 78. Doct. Stu. 1.1.c.8.& tit. Cuftomes.

Kitch.c. Cu-LC Cook.1.2. 1.4. f. 23,24. & SIN.c.f.93.

[d] Plow. fol. 400.

[e] Plow. 88. Elet.1. 1. c.4. M Bract. L.I C.2. num.7.

cul. Juftic. 1.3. [b]

[h] Bract. l I. c. 6 Flet. 1. 1. c. I.

c.I.nu.2. & c. force in divers particuler Counties, Cities, Burroughs, Villages, and Mannors. (b) The publick ludicatories also of England have their customes likewife, which are observed a Brickly as Lawes. (c) But any custome which 10. N. l. Entr. is repugnant either to Law or Reason is to be abolished (d)

8. Naturall Lawes or the Lawes of na stomes, fol. 102 ture are immutable, (e) But the Law of Eng land may by the confent of those, by whole fol. 16. & 17. advile it was first ordained to be altered. (f) Yet so as it do neither oppugne Reason, or the Law of Nature.

9. Now that Law concerning which we shall treat at present, belongs only to persons, things, or Actions, according to the Right and Customes of England, And because Perfonsare the most worthy, as for whose sake all Lawes were ordained: Therefore we dif-[g] Doct, Stu. course first of them, and of their states and 1.1. c. 19. Spe- conditions, which are various and diverse,

thin obtains a white

of the Rights of Persons.

TIT. III.

He first and shortest division of Persons is this, That all men are either Free or (a) Brack. I. I. Servants, (a)

1. Now liberty is a naturall faculty in e- 6.1. very one to doe what seemeth good to them,

fo it be neither against Law or Authority. (b) (b) Braft, eod. Or it may be defined an evacuation of fervi- nu. 2. & 1.2. c. tude, because it is directly contrary unto 19. num. 4.

it. (c)

2. Servitude is a constitution of the Law of Nations; by which, contrary to nature, one is subjected to anothers power; and it is so called from Servando, and not Serviendo, for anciently Princes used to sel their Slaves and for that cause they did reserve, rather then kill them, (d) Wherefore when they (d) Brit. f.77. were afterwards fet at liberty, they were called Manumiss, as being delivered out of the hand; (e)

3. Servants are either those which are borne so, or made so: Those which are borne so, come from Natives, Father and Mother, whether they be marryed or not (which is true both in Natives and them which are free (f) whether they be in the power of their Lord, or out of his power: Also the t is a Servant, whose Mother being a Native, is not marryed, notwithstanding that the Fa-

c.6. Flet. l. 1.

(c) Fl.L.T.c.3

(e) Bract. cod. num.3. Brit.c. 31. Spe. Fuft. c.2. Flet. l.4 .

n.4. Brit.d.c. 6. 2. tom.c 34. (i) Bract.I.i. c.10.n.13.Fl. 60: n: 23: €.6. II.Brit.c.66. fol. 165.b. Bra. 1.1.c. 11. n.1.

(m) F. W. fol. 78. G.

2. Spec. Juft.

1. 2.

ther be free : Because in that case, as a com mon conception, it followes the condition (g) Bratt. eod. of the Mother. (g) And on the contrary, The Islue of a free Woman illegittimate, though 31. Flet.1.1.c. begotten by a Servant : Andit is borne free 3. Spec. Jut d. because in our Law it is reputed, Nullius filius. (b) Those which are Servants borne, we (h) Bratt.t. terme Servanes by Prefeription ; as those al-¿. 6. instit. f. v. so may happily be called Free by prescription, who have gained their freedome through the hegligence of their Lotds. (i)

4. Those which we call Natives are al-1:1. c.7. & 1.4. most the fame with those whom the Romans ert f. Djers fot. called, Adfortptlin gleba : namely those which ferved the Land, together with their Lords : (1) Bract. 1.1. And were mancipated and aliened with their Estates. (4) These we tcarme Villaines Re-(1) Littl.1,2,c, gardants, (1) because they doe, Villis infervis re. Of whom the Arielent Writers of our Lawes speak thus. A native Servant is such a one who is begotten by a Free man of a Woman; who is a Villaine, and lives in a Villairiage, whether they be marryed or not: by a Free man of a Native, is free (m)

5. And so on the contrary, if a Villatine goe in unto a Free woman, the Ifflie half be free; but if it be begotten between the Villaines of feverall Lords, then it is materiall to observe in whole Villainage it was borne, and whom it ought to follow, whether Father of Mother, according as they were eias they were either within, or from under the power of their Lords: Also if it be the

Iffuc

thie of a Free-man and a fingle Woman a Villaine the Ishe shalf be native, because it follows the condition of the Mother, But if of a the Villain, and a Free-man marrying out of the Villinge, and in Libero Thoro, it shall (n) Bratt. I. T. be reputed free and fee of a Free woman and c.6. n.4. Brit.c.

Free man. (n)

6. Those which are made Servants, are made fo by espeivity from the Law of nations. For when Warrs began, captivity followed. A free man may also be made a villaine by Law namely by his own confession and " Formerly the acknowledgement made in one of the fupe- Kings Courts. fiout Courts (a) A Free-man may also be- (o) Brattil. 1. come a Villain according to the Ancients.(p) c.6.x.4.Brit.c. If being once manumitled he shall happen 31.& 43. Fle. to be called back again for his ingratitude in- 1.1.c.3,5. to servitude. But this by the means is uncon- Lit.1.2.c.11. tradified, (4) Allo a free-man may be made a (p) Bratil. 1. Villain, if at first being made either Clark or c. 6. Monk, he shall afterwards return to a Seculer (q) Fort.c.46. life, because such a one ought to be restored (r) Brac.l.I.c. to his Lord (r) Those which are made Vil- 6.n.4. Flet. 1. lains are called Villains in groffe, because 1.c.3. they are of themselves without being appendant to any Efface. (1) But all that are Vil- (s)Lit.1.2.4.11 lains in groffe are not fervance made. Becaufe there may be villain Iffue between those which are our Captives, or by any other of this way become Servants, Which we foon as born like the Islue of Natives fall immediately into the power of the Lord.

7. A Free woman is not made a Villain by marrying with a Villain, and this is in favour of Liberty against the common rule of 31.Fl.l.1.t.3.

our

(t)F.B.f. 78.G

(u) Id.cod.

our Law which speaks, the Wife to bethe fame flesh with the Husband. (t) Andiff Free-man marry a Villaine shee shall be free. (u)

8. But it is reported to be an ancientou frome in Cornwall, that if a Freeman tooks Villain to wife to a free-hold and free-bed if they have Issue two Daughters the one shall be free and the othevillain, (w)

(w) Brac. 1.4. tract.3.c.13. 2. 2.

9. There is a condition of servitude which is tearmed Substantialis. For wholoever is a Ser. vantis so a Servant as that he is nothing

(x) Brac.l.1.d else (x)

c.6. n. 3. Brit. c.3.d.

c.4. fol.25.

13. And there is laftly a certain condition c.31. Flet. 1,1. like to Servants which are yet ingenious and freeborn To wir, those whom we call Apprentices who are bound by their Parents or

Governours to their Masters to learn Mer-(y) An. 5. Eliz chandifing or other mechanik trades, by Covenants; (y) And these are in the power of their Masters during the time covenanted, and make gaines, not for themselves or Pa-

rents, but for their Masters; unless it be other-

wife covenanted for a Covenant prevailes a. (z) Brac.1.2.c. bove Law(z) These oblige themselves in ma-15.&1.5. tr.2. ny things, and cheifly in these namely. That c.3.n. 7. & 15 for the time covenanted they will truly and tr.3.c.9. n.12, faithfully serve their Masters, conceale their fecrets, willingly obey al their lawful and honest commands. That they will not commit Fornication within their Masters House or without, that they will not goe away within their time, nor be absent day or night, that they will no ways damnifie him nor luffer him to be damnified in what they may help

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but that they will with all their might indeayour to hinder his loffe or elfe fore warn him with all possible dilligence, that they wil not inordinately imbezell their Masters Goods, nor lend them to others without his command or special licence, that they will not frequent Taverns unlesse to make bargaines, and therin to serve their Masters. That they will not to the prejudice of their Mafters, play at cards or dice, that they will not intermarry or contract Matrimony with any woman during the faid Term, that they will not trade with their own or anothers Money without leave or license of their said Masters, but that they will well and truly behave themselves in (a)! Ne.b. Entr. word and deed, as a good and faithfull Ap- Ver.coven.in prentice ought to doe. (a)

Apprent:

Of Free-born.

TIT. IV.

A Free-man is naturall and free-born, he is faid to be free born who is free fo foon as born, whether born of two free-born, or of a man free-born and a woman made free, or of a fingle woman and a Freeman (a) provided (a) Fortef.c.43 it be not within a villinage but in a free bed, Flet. 1.2.6.4. norwithstanding it be out of the state of Ma- (b) Vid. sup. trimony. (b)

1. So if of a Freewoman and a Villain out in fine. of Matrimony, and it is sufficient that the Mo-

tit.prox.par.4.

Mother be freent any time namely either the time of conception, parturition or in the intervall, notwithstanding that she become Villain afterwards because the mif-fortune the Mother shall not prejudice the Infant in the Wombe (t)

(c) Brat 1.1.c. 6 #.5. Flet. L. V. C. 4. Lul.2.6.11

2. Soif a Free-man having Children de in Courtacknowledg himfelf a Villain. Thok Children which he shall have after such acknowledgment shall be villaines, but thok which he had before shall be free. (d)

(d) Bracibi fuera.

Ver covers in

A treme

Of such as are made free.

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enders to away diding

TIT. V.

(a)Brac.l.I.c. 6.n:6 Flet.1.1.4.

"Hole are faid to be made free who are I manumissed from a just Servitude. And they are called free men'as being fet free from fervitude; (a) Manumiffion is a giving of liberty, that is a manifesting or declaring according to foule, because liberty which is by the Law of nature cannot be wholly taken away by the Law of nations, albeit it may be under a cloudit (b) and desiration and a

(b) Brac.l.c.s. n.8. Fler & fup. (c)Deer fo.60 na3. and fa.

1. Manumission is two-fold, namely, Expresied or tacite and implyed. (c.) Manumisfion expressed is also double. One which is by writing, as when the Lord gives a Char-266 & 267. 1. ter or instrument of Manumission ro his Villain. And another which is by fact and which was more used of old. As when the Lord

Lord in the presence of his Neighbours, laying his hand upon the head of his Villain shallfay I will that this man be free, and having faidthis letting him go out of his hands shall put him from him, (d)

2. Lambert in his 'Acresovoula, scribeth the ancient formes of Manumission thus. If any one will make his villain free let him with his right hand deliver him to the Sheriff in a full County, and he ought to ouit claime unto him the Bond of fervitude by manumiffion, and show him free Gares and wayes and deliver him free Armes viz lance

and fword, and then he is free.

3. Manumission implyed is when a Lord mall binde himfelf by obligation to pay a cerrain fumar a certain day to his Villaine, of shall bring his action against him for any thing 13. and 1.4.c. which he may challenge as his own, or thall 11. grant him a yearly Rent, or make a Feoffment unto him of Land, or by Deed grant tr.1c.21.3.3.f. him an Estate in Land for life or years, or fi- 192.b.andc.22 nally do any fuch action which we are not u- Brook Tit.vilfed to do but to freemen. (f)

Ifa Villain becomesa secular Preist, yet n 1.2. des Weifs. the Lord may claim him as his Servant and (g) Spec. Just. feile his goods. (g) Bur if he shall enter into cod. Religion it is otherwise, because there he is (h) Lit. c.2.c.

Real Starte on Daneins of the Start I Make of the Lines, which for formarly ages

dead in the eye of the Law, (h)

(d) grac.l.1.c. 5.1.8. femn. ju. ver.manum. Brit. c.31.4%. (c) fo.226.

(c) Flet J.3.6,

(f Brac.1.4. lena fpec. Juft.

· In what causes Manumission cannot be.

TIT. VI.

There are so sew marks lest at this day of servitude or of Villaines that it were to little purpose to prescribe a form of Manumission, and therefore our Authors are silent in it. But that I may add one word for conclusion in this place. Manumission ought to be bounden within the same limits in which other lawfull Acts are; So that neither an Infant nor one that is not Compos mentis, nor one that hath no right, may work any thing by it. All other things, unless any thing be done to defraud, Creditors are lest at pleasure.

Of the taking away the Law which was called, Lex Fusia Caninia.

TIT. VII.

NEither is there amongst us any the least use of this Law, which for so many ages together, was by the Romans abrogated, as envious and cruell. Of those which are in their owne, and those which are under the power of others.

TIT. VIII.

NEE have discoursed before of the I fate of Persons, now we are to make another division: And this is, that every one s either in their owne power, or in the pow- (a) Brac.l. I.c. er of others. (a)

1. In their owne power are all who are not subject to others: But wee shall by consequence know those which are in their owne power, when we shall declare who are under

Subjection to others. (b)

2. In the power of others are Servants; which power of Lords over their Vasfalls is by the Law of nature, and this was sometimes a power of life and death: But now it is more restrained by our civill Law, so that now power over life and lims, is onely annexed to the Supremacy; so that he who shall kill his Servant, shall be no leste punished, then for killing a stranger, for it is very necellary for the Common wealth, that no one doe abuse their owne: and in this they have Law against their Lords, that they may have Justice against them for life and limme, in ercifed by their Lords. (c) As if you destroy Lit. 1.2. C. 11

9. Fet.l.1.c.5.

(b) Brat ib ..

them that they cannot enjoy their Wainage free and fafe: But this is true onely in those Villaines which hold in Ancient Demefne of the Crowne; for it is otherwise of others: Because when ever the Lord shall please, he may take from his Villaine his Wainage, together with all his other Goods whatfoever. (d)

(d) Brac.l.i.c. 9.n.3.Flet .l. I.C.S.

3. And as to free-borne People alfo, fome are in the power of others, as Wards under

(e) Flet.1.1.c.9 the protection of their Guardians or Freind, or under the tuition of their Lords. (e)

of Paternall Jurisdiction.

TIT. IX.

(a) Brac.1.1.c. 9.n.4.and 1.2. 6.24.n.4. and Stat Mer.an. 20.H.3.c.9. Ferm. Jur. Ver. Baftardy Flet. L. B. c, 1. 10.Brit.c.119.

fol. 270.

Flet. 1 1.c.6. (c)Brac.l.I.c.

Flet.1.4.c.5. and 1.4.C.17.

and 1.6.6.56.

Nder the power of Parents are Children borne in lawfull Marrimony; fo are Nothews and their Children, as to Grandfathers and Great Grandfathers on the Fathers fide, (a) But this is true as to Nephews and their Children, onely where their Fathers dye, and they cannot by any means (b) Brac.l.1 .c. goe out of their protection. (b)

1. Those which are not digitimate are nor reputed Children, as in cafe of Adulters and otherwise, nor those who are brought forthcontrary to the form of man kinde : As Monsters and Prodigies in nature, but those 6.n.7.and 1.4. tr.3,c.13. u.2. which are irregular only in members, as having fix fingers, or four, or only one, thall not for that be ofteemed illegitimate. But

2. But we are to observe that, that ancient jurisdiction which the Romans exercised over their Children, (f) is much more qualifi- (f) Institut. Imed with us. For the English only take the pro- periales, eod .tit. fits of the Labours of those Children which are under the age of twenty one years: And that in such manner, that if they live at home with them they may do their own notwithstanding that they are retained in their parents bufiness, and that they findethem dyet and cloathing. But if they be put forth to learn any other Arts, their Masters have the fole benefit of their work, unless any condition forbid, for that a condition may prevail (g) Brack d.2. even against Law. (g)

3. Whatfoever Eftate whither adventiti- e ous or bequeathed especially Land, shall fall. unto Children, the Father shall not so much as have the profits of it, but shall be liable to give an account to his Childe so soon as it shall come of age. But that I may explainit, this Parentall power, relisheth more of that love and respect which Children bare to Parents as a principle infused and instilled by the Law of Religion and nature rather then of any compulsion of force by which the Law (h) Cook, 1.3. obligeth. (b) for our Decalogue, which the Cafu Radclif, Romans wanted, inculcates this respect with fol. 37, 38. promise of divine Benediction. And the only curb with which Parents restrain those that become refractory is the power of disinhetiting which is not often times threatned in vain.

4. Now the Guardianship of wards as double, one by vertue of the common, the other

(i) Cook ubi sup.

Trefp.n. 92.

(1) Bract. 1. 1. tr.5 . c.25.n. I

c.3.n.8. & 1.2. C. 14 Brit . C.

107. Flet. 1.5. C.25.

Bar. & Feme. Doct. & Sin. c.1.c.24. Perk.

217 (n) Gen. 2. 24.

Fl.1.9.c.19. (o(Lib. Intr. tit.Baft. f. 104. Brook eod.tit. Bract. 1.5. tr. 5.c.6.n. 3.& c. 19. n.2. & a. 25. cod. 3. fta. 2.Ca. uni .

(p) Glan. 1.7. c.15,1Brac.1.5. an. 20 H.3.

& c. 14,15.

(r) Term. fur. tit. Baftardy.

other of the Statute Law, (1) And it is true The Common Law gives an action of tre (k) Bract, tit, pass to the Father against him that shall take away his Son and Heire, which Actioni

good in reason because the Marriage of the

Son belongs to him. (k)

Matrimony is a conjunction of mu and woman comprehending fociety ofth life individuall. (1) And so strict is this co iunction in our Law, that man and wife an (m) Brook Tit. reputed but one person. (m) As but one fleshing

villena. 39. & the divine. (n)

6. The Bishop hath determined by the Co non and Statute Law concerning Legitims cy and Illegitimacy, and make, certifican thereof either to the supream power orth

Justices as often as is required. (0)

7. According to the Law and customed England, that lifue which is born before mairiage is a Bastard. But he which marriest fingle woman who is with Child by himle or any other, makes her Islue ligitimate a though it be born immediately after marriage for in this case marriage is a testimony when the Child is, (9) But it is to be diftinguished in the case of him that marries a Widdow with Child, vig. Whither she be apparently with Child at the time of Marriage or whe tr.c.19.n.2. & ther it be doubtfull. For in the first case it shall be reputed the Issue of the former hus-(q)Fle.l.1.0.5. band in the other of the latter. (r)

il uniteration promote the to such de to Tene of our Ancienta Wiel

Of Marriages.

TIT.X.

Wife by the Law of England is under the power and Jurisdiction of her hus- (a) Dyer f. 79. band, (4) and foin duty tied to him that if the n. 5 1. Plow. f. shall be conscious of any fact committed by 307. her husband, the shall not be punished for (b) Glan. 1.11. concealing it, (b) But the is obliged to hin- c.3. Bratt 1.1. der as much as in her lieth, (c) and accor- c.6. n.2. & 1.2 ding to our ancient Authors, if stolne goods c.15. & 1.5 tr. be found under her lock and key, the thall 5.c.17. n. 2. be esteemed equally guilty with her husband. (c) Flet.1.1.c. And so also if the things stolne be found in 38. her hands, (d) but at this day the Law, is (d) Flet.ibid. so much altered, as it seems, that if the Wife commit Thest by the instigation of her Hus- (e) Fitz tit. band the shall not be guilty of Felony. (e)

1. And in the same Bond is that woman ob- Brook, ib. 108. liged which shal marry a Villain. For if a woman who is a Coheir marry a Villain she cannot claim her Partition, before her time i.e. (F) Brac.l.s.tr. before the death of her Husband. (f) In a word whenfoever the Husband during Co- 5.6.25.n.2.Fl. verture shall dispose of the Lands of his Wife 1.4.c. 12.n. 1. except only where a Fine is levied, the superviving may after his death, difsolve fuch Contracts as done at fuch a time when as the being under Coverture was so tied by the Law (g) Plo.265. that the could not contradict him, (g) nay ac- & 32 H.S.G.2 cording

Crowne,99.

(h) Glan.1.2. C.4.

(i) Lit.1.1.c.4.

(Pract. l. 1. c.36.nu.3. In-(14. c.24. Dyer 143.2.56. (In Brac. ib.Infir. ib. (m) 32 H. 8.

(n) Lit.l.1.c.5 (of) In this it tollowes the Common Law: (p) Lit.1.2. c. II.

(q) Ca. cum trim. ce tas fentenquem etiam

cording to some of our Ancients a Wife? fo far obliged to obey her Husband, that if the Husband shall sell her Joynture against he will the shall not recover her Dower against the Vendees after his decease, (b) for that the ought to rest filent, and obey her Husband patiently, who disposed in that manne of her Dower as to maintain her life. But this

Law is long time out of date (i).

2. Contracts of Matrimony may be entre into at the age of feven years (4) but they are not to intermarry untill a fit age, viz. the man at fourteen and the woman at twelve years old(1) and not in any degree of confanguinity or affinity, which is forbidden by the Leviticall Law, (m) and by our Law if a woman entermariy at nine years of age and furvive her Husband, the shall have her Dower because at that age she is defined to be capable of it. (n) And this is equally a rule both for Villains and those that are free, for Villains may enter marriage lawfully (o) but they are punishable if they do without license of their Lord. (p)

3. The confent of Parents is not fo effenapied 23.ext.de tially necessary with us that for default there-Confa & ma- in a matrimoniall Contract made between them that are free being, De prafenti, should be (r) Cujacius in nulled, for in this we follow the Pontificall Julii Pauli re- Law, (q) and this some affirm true in the Civill Law alfo. (r) However Tribonianus in that rias, 1.2. c. 19. long and wearisome worke of his indigefling the Lawharh happened to omit it, for vid 1. observat. here the words of Paulus are expressed For . those who are under the power of Fathers, they they ought not by Law to contract Matrimony without their confent, but being once conracted it cannot possibly be dissolved For hat the regard which is had to the publick good is to be preferred to private Convenieny. (s)

4. And yet Marriages are not so absolutely nupriis. recwith us for they which hold in Fee of the ling in Capite, that is in right of his Crown, r of any Honour or Mannor of his; or of a ommon personally Knights Service, if at the ay of the Ancestors death the party be withage and unmarried he cannot without pealty refuse a Wife tendred unto him by the ord of the Fee; For in such case he shall ay unto him the value of the marriage: If be that the Lord doe tender unto him whilest he is within age a wife who is fit for im without disparity or (as our law expresent Disparagment. (1) yet if the Lord shaltender (t) Brit. c.66. one, fome are of opinion thathe may not- 20 H.3.c.7. ithftanding claim the value of the Heir when F.B.f. 141,174 e comes to age. (a) But here it is to be di- Glan.1.7.c.13. inguished whether the ward refuse the Wife Lit.1.2.c.4. endred to him by his Guardian, and remain Flet.1.1.c.13. nmarried till he comes of age, or whither (u Dyer, f 255 fter fuch refusall, he shall yet marry another 260. or in the first case he shall only be compelled pay the value of the marriage fimply, but n the later he shall payit double. (w) And this is true also of womenwho are un- Lit.1.2. c.4.

er the age of 14. at the death of their Ance- Stat. Merc. c. 6. ors and unmarried for they also are bound well. 1.c. 12. ther to marry or pray the value to their uardian if within two years after fourteen

femen.c.19.de

(w) F.B. 141.

be compleated, he shall tender them a fitting (x) wefim. T.c. husband, (x) but where the Guardian makes 12. Brit.c.67. no tender, the Law is the same as in the case Byac. 1.2.c.37. of men.

n.6. Flet.l.I. c. 13,

6. Now disparagement is where the Guardianshal tender to his ward a woman wanting a Foot or a hand, one that is maimed, imperfect or deformed, or that hath an infections, contagious disease; One that is old and put hope of Iffue (y) or in case the Guardian shi tender, a Villain, Burger, or one that is menly discended to her that is, Noble, (3)

(y) Lit.1.2.c.4 (Z) Flet.l.I.c. 13.

7. If there be many Lords of whom the Fee is holden, the King (if he be one) that have the wardship of the Heir. But if the be all common persons, he shall be preferm to whom the Ancestors did first Homage for the marriage will not admit partition Bur if this cannot appear, he shall be pre ferred who first enfeoffed the Ancestors, an if this cannot be proved, then that Lord wh (a) Flet I. I.c. that gain the policition first of the ward (a)

8. If the Lord of the Fee shall marry ward made within the age of fourteen year the ward to foone as he shall come to that ar niay difcent and leave her, which is allow in Females who by consent of their Guard (b) Lit.1.2.c.4. ans shall marry within the age of twelve and here both Sexes have the fame In

that after marriage to had, under age by fignation of the Guardian. They are no me

obliged to his arbitrement the bond of Man (c) Brac.1.2.c. mony being diffolved by death. (c) And the 37. n. 6. Lit.t. by an inequality of marrying them, 2.6.4.

Guardian shall loofe his ward, and shall

table to latisfie the freinds of the ward fo disparaged for sogreat a damage (d)

9. Heretofore when an Heir female was at Lit .1.2.c.4. ge, and held of divers Lords in Fee, it was Inflit. Jur.com. Sufficient for her in marrying to require the 24. affent of the next capitall Lord to whom her Ancestors had done legiance, (e) but at this (c) Eract. d.l. day, the that is of age, is not obliged to ask the 2.c.37.n.6.

confent of her Lord to marry (f) (f) Erock, tit.

15. If the Heir of Tenant in Chivalry not Guard. 7. being of that age at which by the Law he may consent to marry, shall marry in his Fathers life time: his Father being dead, the Lord of the Fee shall have a Writ of Ravishment, because it is in the power of the Heir to repudiate his wife when he shall come (g) F.B. 143. to that full age, (g) and a woman who holdeth of the King in this manner, being thus married; is at her own election, when the shall come to age whether the will adhere to the former marriage or accept of fuch a Husband as the King thall tender, (b)

11. Those Widdows also which are termed the Kings Widdowes do make Oath not to enter marriage again without the Kings confent, And if they do otherwise the King may by diffrefs seife himself of those lands and tenements which they have in Dower untill they or their Husbands shall pay such Fines as the King at pleasure stall impose. (i) Magna charta also doth affirm that common perlons may exercise the same power over their & 174. 17 E. Widdows & And there is this reason given, 2. 1. least the Kings Tenants should enter marr: - (k) c. 7. age with his capitall enemies. (1)

Stat I.c.s.

(i) Stan. Prev. c.4. Glan.1.7. c.12. Flet. 1.7. c.33. F.B.263

(1) Fl.l.1.c.13

12. who-

12. Whofoever shall steal or draw away anothers ward although he restore the ward afterwards unmarried or fatisfic for the marriage, shall for such trespass sufter imprison ment for two years. And if he doth not reftore the faid ward but marries him or her, and is not able to farishe for the fame he ful abiure the Realm or be imprisoned during

(m) Flet. 1. 1. life, (m)

C.13 .

(n) This power is now in the Chancery.

(0) 4 &5 Phi. & Mar. c.8. Cook, 1.3. Nut. Cafe, f.39. (p) Lit.l.2.c.

(q) Idem ibid. her. (q)

13. If any person above the age of fourten shall draw away an unmarried woman under fixteen without confent of Parents, or at leaf those who had the Gard of her, he shall suffer two years imprisonment without Bail or at least be fined for his faid offence, according to discretion of the Star chamber (s But if he shall defile her being so stolnes way or any way contract marriage with hera gainst the consent of her Parents, or Guardianshe shall be imprisoned for five years or much according to the discretion of the faid Court, And if fuch woman being above twelve and under fixteen shall by her own confent marry with fuch ravisher she shall forfeit all and finguler thole Lands. Tenements and Hereditaments which at the time of fuch confent given, the had either in poslession, Reversion or Remainder, (0)

14. Villaines are not to marry without consent of their Patrons. () Also if a freeman shall take away ones native in marriage without the confent of her Lord, although the Lord cannot take her from him, yet he may have his action for the Ravishment of

15. Women

6

M

15. Women that marry noble men shall have the appellation and priviledges of noble persons for that dignity they derive from their husbands untill they shall again marry with common persons (q) for by marrying they make themselves the same flesh with (r) 20 H.6.c.6 their Husbands(r)but if it shal be demanded whether a woman more noble marrying with a man leffe noble or a common person may free her Chaplaines for non-refidency according to the Statute in that case provided, we (s) 21 H.S. c. cannot answer without distinguishing. For 13. second marriages will not prejudice those which thee had during widdowhood. But the cannot impart the same priviledge to them, which the shall have after the second marrying, because her nobility is extinct. (t) (t) Cook, 1.4. Notwithstanding, that it seems to be other- Actions Case, f. wife with those which are born noble and 117. derive not their nobility from marriage. (u) (u) Id. ibid. for that luch who draw their nobility from their Ancestors are more esteemed and honored with us then they which take it onely from their Husbands.

16. If any come together against the leviticall Law we neither understand them man and Wife, nor do we allow of their contracts, marriage or Dower. Their Islue gaining no other esteem then to be termed na- (w) 32 H.S. turall, (w) Those only are faid to be divorced 6.38. by our Lawyers, whose Marriages are nul'd for that there may be a seperation, a mensa & thore, and yet the Marrimonial bond remain (x) Term. Jur. unbroken. (x)

17. Those which are unlawfully begot-

verl Divorce.

(y) Bract.1.

ten cannot possibly be made ligitimate, But they are often made capable of Preift. hood or exercifing facred functions by difpenfation, (y) A spurious Issue may by silence and patience be rendred legitimate; as in case a Wife shall conceive by another man befides her Husband, notwithstanding thatit be apparent, yet if the husband entertain luch Iffue in his Family and bring it up and call it as his Child, he makes it his owne, lawful Son and Heir, which is equally true if he do not lo call it expresly if he do not remove it and renounce it, nor is it materiall whether the Husband be ignorant or knowing of it, or whether he doubt, for it shall be reputed his lawfull Heir because born of his Wife, to long as it may be prefumed that her Husband begot it. And this may be fald also of a suppoled lifue, for that often a common opinion paffeth for a truth.(2)

(z) Bract.d.l. 2.0.27. n.4.5.

and effects of Marriage. The first, that all moveable Goods (which by us are tearmed personall Chattells) which the Wife brings with her do presently passe into the husbands Patrimony, without any distinction being thereby (as it were swallowed up, nor canany thing be reassumed by the Wife surviving but her womans apparell; and so of imoveables and realls if aliened by the Husband in his lifetime, but for those which are not alienated, he being dead they shall return to the Wife, (a) but if a Wife being Executive or Administratrix to a former Husband, marries a second and surviveshim, she shall have

(2) Plom.418.

all those Goods both personall and and reall which the brought unto him as possessed of by reason of that relation and office and which are not alienated by her second husband, restored unto her without diminuti- (b) Vid.infra. on. (b)

The other consequence of Marriage is

that lawfull or reasonable Dower under which notion the thall have the third part of (c) Flet. 1.5.c. all such Lands and Tenements which her Husband was seised of in Fee for her life (c) but in case the husband shall happen to be artainted of treason or felony there the wife shall loose her Dower, (d)

tit. 11.par.7.

22. & 27. An. 3.8 6 Id. 6. m provis. Dyer 140.

(d) I fac.fe(. 1.6.11. & 12.

Of Adoptions.

TIT. XI. (4)

(a) Bract. 1.29

Rattoh in the place before mentioned 6.29. 1.43 5. calls filence and Patience in the cale of adulterate Iffue, adoption which creates fuch Children being in our power, free and legitimate. I have also heard of that kind of Adoption amongst us which the Romans used. But this seemes rather to be by private will and agreement of the persons adopting and adopted, then by any Law; for this is at our own election that we may give Lands purchased by our selves or which we have by discent, unlesse they be given con-ditionally or (as we tearm it) by intail, to

whomsoever we please, whether to one of our Kindred, or whether it be to a stranger without having any relation to those Children which we have, whence it is apparent, that the custome which the Romans had of Adoption was either never received amongst us or else that it is long since, as with the French, wholy extinct. (b)

(b) V. Equinarium Baronem in particula pofleriors suorum comment. su er Instit hoc Tit.

How and by what means Taternall furifdiction is dissolved.

TIT. XII.

Jurisdiction is occasioned and constituted, now we are to declare how it is disolved and taken away: And we must know that this is done three manner of wajes. By naturall death, by civill death, and by dignity or honour. For if the Father in whose power the Son is, dieth, the Son remains at his own disposing although sometime in the custody of a Lord or the care of Freinds or Parents. But the Grandfather on the Fathers side being dead, the grandchildren are not in their own power; but remain under the Jurisdiction of the Father, if he survive the Grandfather, and do not at all go out of his power as in the case of a Emancipation, or Dignity, (a)

(a) Braff. 1.1. c.10. Flet.1:1. c.7.

1. So by a civill death, as in case the Fa-

ther be condemned for Felony committed, or exiled. But if he be banished but for a time he shal retain his Children under his power, because whatever is his he shall injoy at his coming back, (b)

2. Paternall Jurildiction is dissolved also by Emancipation: As if a man discharge his Son from his family with any part of his Inheritance, as it was the custome in former times, (e) for this kind is a kind of a civill (e) Id. eod. death of the Son, as is the entrance into Religion. (d)

3. This power is distolved also by dignity, as in a case the Son be made a Bithop. (e)

4. But as this Bond of paternall power is not so strict with us as it was with the Romans, so neither is the releasing of it by Emancipation fo usuall: For I finde nothing in our Lawes, which hinders a son or daughter from disposing of themselves, even against their Fathers consent so soon as they shall come to the age of one and twenty years. It is most certain that they may then enter Marriage or Contract with any one, and be no leffe obliged by a Contract then f they were threescore. For this age with us (f) Bratt.1.1. is perfect and full maturity. (f)

(b) Id. ibid.

(d)4 H.4.c,17

(c) Brack, whi

c.10, n.2, Lit. 1.2.6.4.

Of Wardships.

TIT. XIJI.

Jurisdiction of others, there are some which are in the custody or protection of Lords, some are under the care of Parents, and Freinds, and some are not obliged by either, as those which are at full age, (a)

(2) Brack. 1,1. c.10.num.2.

1. The word protection, is not so frequent with us as Custody. For as we have many Species of Law from the Normans, so have we words also, now they call hims Guardian which the Romans tearmed To tor or which was rather meant and comprehended under their appellations of Tuto and Curator together. In which we imitate

them in calling them Guardians

2. These Guardians are appointed some times by the Fathers will, sometimes by the Law, and sometimes by the Magistrate. For where the Father hath only an Estate of Money or Chattells to leave to those Children which being under age are in his power, is may commit the care and Government of them together, with the Legacies to any of his Freinds, (b) he also hath the like power with a Father who shall inscort an Insant a Lawes, for he may commit the Custody of him according to his pleasure to whom the pleasure to whom the pleasure who shall instant a pleasure to whom the custody of the control of the control of the custody of the control of the custody of the control of the custody of the

(b) Cook,1.3. Cafe Ratcl. f. 37, 38. pleaseth, (e) and what is here mentioned of (c) Flet.1.1.c.g.
Children born may be understood of Post
bumi.

Who they are that by Testament may appear Guardians.

TIT. XIIII.

Hosoever hath a Free administration and power of dispensing his Goods may, constitute a Guardian by his will, provided he befor per- (a) Glan.1.7. sectage and sound memory, (a) and this also c. 6. may be performed by a Woman, (b) But if (b) Brit. c.35. an Insant or one that is not Compos mentis be ordained, he cannot be admitted untill the (c) Swind.part desect be removed. (c) 3. Sect. 10.

1. A man may constitute his own Villain or Native Guardian over his Children, or anothers with the permission of his Lord, (d) Sus. de libut it is worthy consideration whether a Vilbertinis, tit. 5. laine by this Act, shall gain his Liber-(e) Brook, Tety. (d)

that the the transfer the the bloom

2. One may also constitute his Appren- (f) Swinb pare tice (e) wholoever may be an Executor may 3. Sett. 10. also be a Guardian. (f)

the such as the superior of the last that the

of the lawfull Guardian-ship of Kindred.

TIT. XV.

W dians' which are appointed by Law and this is by reason of an Estate in Fee which shall discend to Infants by right of In-

heritance: But if Tenant in Socage dies, the next Heir whether Son or Daughter, it an Infant shall be in the custody of the next of Kinn on that fide to whom the Inheritance cannot discend, for examples sake, if the Estate come by the Fathers fide, then the Mother, or if the be dead, the next of Kinnot her fide shall have the custody of the Infant, If by the Mothers fide, then the next of kins on the Fathers fide (a) and this is the reason of the Law. Because the Infantsmay be in less danger in their hands, to whom their death is least advantagious. (b) so that none that is a Copar mer in Socage ought to be in the Gard or Custody of her Coparemer or her am. 11,12,13. Husband but of some of her Parents, andif Plowd. 195 any one shall buy the Gard of the Lands of (b) Fort.c. 14. the marriage of the Daughters and shall take any of them to Wife, he is presently suspeeted and shall by the Law loofe the Gard of the Body, and the marriage of the rest by (c) Fle.l. 1.c. reason of the suspition. (c)

1. But

(a) Glan.1.7. C. 11. Lit. 1.2. c.5. Bract.l.z. 6.77.n. 6. 52 H.3.C.17. Broo. tit. Guar.

o prochem.

& 45.

1, But if two . Brothers purchase Land them, their Heires, the elder if at age ay have the Gard of the younger, being Infant provided they be both legitimate.

(d) Brit. c.35.

2. And thefe Heires according to the fol. 92. ncients, go out of. Wardship at fifteen years

fage. (e) But according to the moderne actile at fourteen, (f) in regard the Law pposeth that at this age they are able to erform those things which belong to Husndry. But Tenants by the custome called

avelkinde, being fixteen years old comeat, may alien their Lands by Feofiment; thout license from their Guardians, (e)

3. So also Tenants in Burgage, who are fants; their Father or Ancestor being dead e committed, for the same reason which enant in Socage are, to the Custody of beir Kindred. From whence they are freed foon as they shall beable discreetly to unt Money, and measure Cloth, and perrm other such like businesses. But in this le the certain time is not defined but is addged by the discretion and maturity of the cires, (b)

4. A Woman is supposed to be of perfect e in Socage in all cales so soon as the is ae to know how to dispose of her house, and do those things which belong to the difpling and ordering her Family and is able understand what appertains to Cone and ey, which cannot be before the be fourteen fifteen years old because this age requires (i) Bract.1.2.

rder and judgment. (i)

(e) Glan.1.7.

c.9. Braft.1.2. c.36.n2.Flet. 1.1.6.11.

(f) Lit.1.2.c.5 Doct & Stu.c. 7 fol.141. F. B. 118.

(g) Dyer, fo. 301.11.41. Fitzb. Custome II. Erook sibid.

h) Bratt ubi. Jup. Flet.l.I.

5, A female (.39, n. 3.

(k) Bratt. 1.2.

(1) Instit. Jur. com. c.24. Lit. 2.c.4. (m) Lit. l.2.c. F.B. 118,119

262, Flet. l.1.

(n)F.B.143.P

7. A female Heir was according to la ancient writers judged equall with and as for years according to the diversities Tenures, viz. That the should have the fa age in Burgage and Socage, as a male wit, fifteen years. And in Chivalry like as the male, viz. 21. And that then t Wardship should end. But according others, a Woman is said to be at full age Chrvalrie at fifteen, for then they fay, fit able to order her house, and to marry a H band; who shall be able to perform Service for her, (4) But our moderns define other wife, and here they put a difference w ther she be fourteen years old at the death her Ancestor or not, for if she be, she de immediately receive the profits of her Lan otherwife not till the comes to fixteen. (A)

6. Guardian in Socage shall give and count of his Office to his ward whent Wardship is out. (m) But he may committee Custody of his Ward to a stranger and

Grant shall be good. (n)

Of Disfranchisement, or Deni nutio capitis.

TIT. XVI.

That which the Romans called Demini capitis, and devided into three kinds,

Lames of England.

be so distinguished by the English. Notwithinding that we do tacitely acknowledge it
suble by our Lawes. That which they teared the least we wholy omit, for those which
e emancipated by their Fathers, do not
ose the Right of their former family. But
at they may (at least making a partition
Goods and Chattells) be received as to
e succession or Inheritance of an Intestate
those who are adopted by others have
e rights of their new faculty, either (a) Sup.tit.A-

woon the sole agreement or the expressed dopt. 17.
courtesy of those by whom they are adopted (b) Stan. placit.
thout affistance of the Law, required or Corp. 1.2. &
pected. (a)

Prerog. c. 44.

1. Those who are, Servi pena, namely (c) See the 4.

ofe which have sentence for Treason or Book, iit. of

elony loose all that can be lost: Not only Pub. Ju.

meir Freedome and Liberry but even all (d) Brac.l.3.

at they have, and their lives also, (b) Nor trast.2.c.16.

we they other Successor then the Exche-Brit.c.16.

er or the Lord of the Manner: as we shal (e) 22 H.8.c.

ew else where, (c) and therefore we may 14.8 36 H.8.

th reason call this the greatest Disfran-c.13.8 28 H.

sistement or Capitis diminutio.

8.c.7.8 32 H.

2. And although the ancient Law which 8.c.12. & 53 missined, (d) those who took Sanctuary for H.8.c.15.1 E. reason be abrogated, (e) yet at this day 6.c.12.& 2 E. ere are certain crimes which are punished 6.c.2. & c.33. th abjuration, (f) but those who undergo & 5 E.6.c.19. is penalty seem to undergo the lesser dis-(f) Ch.de Foranchisement or that which the Romans rest.c.10.& 13 alled, Medium capitis diminutionem.

Ed.1. c. 35. &

3. That which was rearmed Cognationis jus, 25 H.8.c.14. is the lester and more inferiour Capitis 35 Eliz.c.2.

D z diminutio

Institutes of the

(g) Bratt.& Brit.ut supra.

(h) Bract. 1.5.

diminutio, and seems to be wholy takens way with us, for those who abjure the Real are wholy thrust out of protection, (g) and those who are out of the Allegiance of supream power of England, have nothing tengland. (h)

Of the lawfull Guardianship of Lords or Patrons.

TIT. XVII.

(a (Pratci lexicon verb. Patronus.

UR Lawes do not decree any thin Othat I know concerning that Patronova Tutela, which the Roman Law mentions, Bo we have another kinde of Patronage into pect of the Fee which we posses, and these tearmed the Lords of the Fee. (a) And the are very few Infants that fucced to good! states, who escape their Wardship and Ca stody. For as there is none with us except Crown) who are seifed of their Estates an Tenements in a freer or larger Titleth Fee, so is there scarce any Fee less worth But that it is bound to the Lord or a Patro by Knights Service; now those things while are proper to this Service, are Gard, Man age, and Releife. (b)

(b) Lit.l.2.c.4 (c) F.B.262. Fletl.1.c.11. Dyer,362.Gla. l.7.c.9. Bract. l.2.c.32. Brit. c.66.Ltt.l.2.

cestors, (6) in Knights Service remainess der the Guard and Custody of his Lord will he come to perfect age. For before the

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ge he is not adjudged capable of those warick accomplishments requisite for a Knight and due to his Lord by reason of his Tehure, notwithstanding that it falls out sometimes that age being dispensed with some are lefted into the order of Knighthood before they be compleat one and twenty years old: But our Law supposeth these to be able to do those Offices due to the Lord of the Fee, (d) Brook, tit. wherefore they are out of the custody though Gard. 43.873 Infants, (d)

2. And this right of custody springs from ral. f.29. Plow this reason, that fince he who holds by 267. Knights Service is obliged according to the greement at the first investing of the Estate to follow his Lord as a Knight in the Kings Wars. It is prefumed that no man will be more carefull in training up the Infant in (c) Fort. c.44. feats of Armes then the Lord himself. (e)

3. But if such an Heir be female she remaines in custody according to the Ancients (f) Bratt. 1.2. (f) but till fifteen, and according to our mo- 6.37.n.3. derns no longer then fixteen years of age (g) (g) Lit.l.2.c.4 for no sooner doe they come to that age, but they are immediately presumed to be able to govern their house, and to marry such a Husband that shall be capable of doing the Ser- (h) Bract. & vice due to the Lord of the Fee. (b) But if Lit. ibid. hee be complear fourteen years old at the death of her Ancestor, neither her Body (i) Lit.l.2.c.4. or Land shall sall under the Custody of Mert.c.6. West. the Lord. (i)

4. But if in this case it come in question, Jur. Com. C. 24. whether the Heir be an infant or nor, he shal Br.tit. Gard.7. remain

Fulbeck in pa-

Polid . Virg.1. 16.

I.C22.Inftit.

(k) Brac.1.2. remain in cuftody untill it be determine

c.37. Brit.c.66 (k) fol. 167. b.

the Mothers side, the Father living shall have the Guard of his Body, and the Lord of the Land, for it is a Maxim, that no one as to his Person shall fall into the custom of the Lord his Father living (1)

(1) Lit.1.2.c.4. of the Lord, his Father living. (1)

6. If Lands discend to a Wife who alter Issue had by her Husband dieth. So that its Husband for default of having possession the Lands in the life of his Wife cannot be a tenant by the courtesse of England. In this case the Issue, unlesse it be Heir to the Father as being his eldest Son, shall be in custody. And if such Issue be a tenale and an Insurant the death of her Mother, she shall remain Is her Father have a Son living, in custom notwithstanding her Father be alire (m)

(ti) F.B. fol.

7. Lord of a Knights Fee, may transfer the gard of his Tenant to another. From whence there ariseth this distinction of Guardiania Law, and Guardian in Tail. Guardian in Law is the Lord himself. Guardian in Tail is he to whom the Lord hath granted the constant of the Co

(n) Brack. l.1. c.37.n.3.Lit.!.

2.6.4.

the Custody of his Heir, (n)

8. There is also a Guardian simply and originally so called, and a Guardian by accident, from the cause of custody, Originally is he who in right of his Fee hath the custody of his Tenant. Causarily, is he who so that he hath the custody of his own Tenant being yet an Infant hath upon that score the custody of another who is Tenant to his Ward,

Vard, (e) For an Infant cannot be Guardi- (o) F.B.fol. n of an Infant. (p)

When there is an Heir male or female 123 n.38. ho hath many capitall Lords, they cannot (p) Flet.l.t.c. I have the custody of the Heir, and there- 11. ore one must be preferred before the rest : ind that is he who first infeoffed the Tenant

h Knights Service, the rest shall only be ermitted, the custody of the Lands which (q) Brast. 1. 2.

re holden of their Fee. (q)

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10. But if any Heir hold of the King in, Stamf. Prerog. apite by Knights Service, whether he hath 6.2. ther Lords or not, the King shall be prefered before the rest, to the custody of the seir; and that notwithstanding, Priority or ofteriority of infeoffing. For that the King ath no equall or superiour in his Realme (r) Glan.1.7.

11. A Ward who is once freed from the custody of his Guardian [as by marrying or ontracting Matrimony with his content] hall not return again into the custody. And hat notwithstanding he be under fourteen ears of age, or afterwards that he shall mary before 21. (s)

12. If there shall be many Daughters Coheires who hold by Knights Service: They hall be all under the custody of the capitall ord, and none under the custody of the (t) Bract.1.2. Mother, (t)

c.37.1.4, &c.

c. 10. Bract.co Stam.ut [up.

(s) Bract. 1.2. c.38.n.1.Lit.l.

2.64.

c.37.n.6.

Of the Legall Guardianship of Parents.

TIT. XVIII.

THE Father is preferred before allowers, to the custody of his eldest Sa For if an Inheritance fall to such an Infa who hath a Father living; notwithstanding that the Lands, if they be holden in Knight Service be in the custody of the Lordos the Fee. Yet the Body of the Heir shall remain with his Father. (a)

r. So also, the Mother of an Infantwh holds in Socage, shall have the Custody of the Body and Lands of the Heire before as kindred, either of the Fathers side or Mother

fide.

(a) Lit.l.2.e.4 Cook,l.3.Cafe Kat.fo..37.

Of Fiduciary Guardianships.

TIT. XIX.

That Tutela Fiduciaria, which the Roman imposed upon the male children, the Parents being dead and upon the Children of Patrons, our Ancestors seem wholly that eneglected. Concerning the first, Was

have nothing determined fave that which we mentioned before of the legall Guardianthip of Kindred. But as for the other, they do not transfer it upon the Children of the Patrons but upon the Executors rather (a) for (a) Lit.1.1.4.5 they reckon the custody of Wards, among Chattells reall, (b) and therefore if the Patron or Lord of the Fee do not demise them by his last will, they are transmitted by the Common Law to the Executors of his last Will.

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(b) N. Ter. ver. Chattels. Flet. 1. I. c. II.

Of the Attilian Tutorship which is appointed by the Lex Julia Titia.

TIT. XX.

V E E have sometimes Tutores Dativi, or deputed Guardians amongst us. For in case the Mother being dead the Father dy intestate and leaves Children under age, who have no Fee to succeed unto; it often happens that the Ecclesiasticall Judge commit the Guard of them, to fuch as shall have a care of their Persons and Patrimony, untill they come to fourteen years of age. And this is often attested and confirmed by an Instrument authentickly sealed: But our Law doth not compell any one to such an Office, nay rather the Judges stir up

(a) Swinb.part 3. Sett .9.

(b) 1.2.c.11. L.I.c.9.

and make choise of those whom affinity and confanguinity oblige to this work of love and Charity (a)

1. And probably that Guardian may no improperly be stiled Dativus, Tutor which Bracton mentioneth, (b) when he faith that n.1 & Brit. c. it is convenient for him that giveth Land 34,40,62.Fle. or Tenements to an Infant to appoint him: Guardian also, giving this reason because the Donor cannot be Guardian least he feen to continue his own Seifin nor can an la fant consent to the Gift but by his Guardi-

> 2. The Supream power may by Letters Patents constitute to an Infant an universall Guardian to answer & appear for him in all Adions begun, and to be begun, and that before any Judg or Judges whatlocver. Or the fame power may authorife two or three Guardians joyntly or feverally to answer or profecut any Action in his behalfe, and the fame letters at the instance of the Infant may give power to the same Guardians joyntly and Severally, to substitute other Guardians under them who may in their place and stead act for the faid Infant in all causes and complaints or make defence for him (c)

3. Nor is it unusuall in Court-Baronsor other liberties for the Steward or municipal Magistrate to appoint Guardians to Infant

(4)

(c) F.B. fol. 27.6.

(d) Kitch. in preceden.pa. 347.

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Of the Authority of Tutors and Guardians.

TIT. XXI.

A N Infant under the age of twenty one years cannot make any contract in his (a) Breok, tit.
own name (except for those things which ap- Inf. 51. pertain to his necessary Food, Rayment, and (b) New book Education] (a) without the Authority and of Entrys, tit... stody he is(b) nor can he commence his Suit com, os mentis. against his Guardian (c) An Infant may by Brack.1.5. trac. himselfand by his own Deed better his, 3.c.11, 1. 1. condition, but he cannot prejudice himself (c) Bract.1.5. (d)

1. There is something more particular in 5. Brit. c.121. those who hold by Knights Service: For the (d) Brack.1.2. capital Lords have a plenary power over their c.5.n.8. whole Estate without their persons and sometimes over their Persons also, and so that they have the full disposing of Advowsons in case of Vacancies, and in granting, giving, or felling their Wards, And (in case of semale Heires) of marrying them or felling their Marriages, and generally of disposing all (e) Of late for things whatfoever for the profit of the Heir, their owne pro-(e) as if they were to dispose of their own and per profit. better if possible. They may fell their custody Brook, Gard. 2. of the Lands and the marriages of the Heires Fitz. Accompt, if unmarried, but they cannot alien any 36.

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thing of the Inheritance, or fell the Re mainder. Notwithstanding, as for the hein which are in custody, they are to treat the honorably, and to discharge the dutyeste longing to the Inheritance according to the quantity of the Inheritance, and for the rate according to the time of the Wardship, The may manage the affraies of their Heires, to cover their right in those things wherein the Heir as an Infant may plead, or move or prosecute a Suit in their behalf; namel of the rights of possession of proper Seifin, or of the Seisin of an Ancestor. But in a Action of right in case of property they ca neither act nor answer for them, excepte that of which the Infant was infeuffed di ring his Minority. (f)

(f) Brad. 1.2. 6.37 n.3. & Brit. c.34. fol. 90.

2. Guardians ought to sustain and keeping repaire the Houses of their Wards, as also their Parks, Warrens, Fishings, Mills, and other Appurtenances; least by neglect they be impaired or ruined, by which, wast may be found: They are also bound to redeliver the Lands in due time free, at least as they received them and that Gratis, quitted both of releife and Fine, in case they be accorded and agreed concerning Marriage (g)

(g) Flet, l.1. c.12, Mag. Cha. c.4. West. 1.c. 47. 6 Ed. 1. c. 5. West. 2.c. 35.

3. The same Authority also have Guardians in Socage, to contract, to manage Suits in Law, and to do all other things which are behoovefull, either for the conservation of augmentation of the Estate of their Pupill: But these are liable to render an account when their Wards shall come to age.

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(h) F.B.fol.

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4, A Guardian may make Oath for his

Word. (i) 5. In some Cases our Lawdoth so highly avour Infants, that it will not fuffer them to run the hazard of Judgement although with the consent of their Guardians but stay proseeding untill they come of age. For in case of right or property of their possessions they (k) Glan.1.7.c. can neither sue nor be sued, except for such 9. Bratt.1.5. which themselves have gaind. (k) yet for- traft.5.c.21.n. merly there were bound in case of a Fine ac- 2. knowledged in Court in, case of a proper in- (1) Dyer, fol. jury, or Dower, or in Case of what them- 104. & f. 137 felves had recovered, (1) but at this day (m) Flet.1.1.

(i) Flet.1. 6.c.

c.9.4 H.7.c.24 F.B. fol.21.

By what means Wardships expire.

they are not bound in case of Fine, (m)

TAT. XXII.

A LL Wards whatfoever not holding by Knights Service are without more-adoe freed from their Guardians at fourteen years of age (a) but those Tenants if male, not till (a) Lit.1.2.6.4 one and twenty, if female not till fourteen (b) or in some cases not till fixteen years of (b) Id. ibid. age, (c) and although a Woman being full (c) V. fu; .tt. twelve years old may contract Matrimony, 15. Sett. 4. as well by our Law as by the Civill (d) being (d) Bratt. 1.2. then adjudged capable of a Husband: yet c.37.n.7. the doth not fo foon come to maturity of Judgement

Judgment but it is sooner notwithstanding out of custody then a man, because when the marrieth the doth but alter her condition entring under a new power of a Husband, in-

c.7. Bract. 1.1.

¢.6.n.2. (f)V. sus.tit.

(g) Bratt. 1.2. C.S.R.6.

(e) Glan.1.11. Stead of the custody of her Guardian.(e) 1. So a Wardship may expire by the naturall or Civill death (1) of the Guardian which is that which we tearmed the, Manma or Mediacapitis diminutio, or in casethe Guardian shall give Lands, Oc. to his Ward

or infeoff him. For no man can be both Guardian and Feoffor at one and the fame time. (e) But this is most remarkeable in Guardians which are fo by reason of Knights Service, that they may either affigne the custody of their Wards, to another; orbequeath them amongst their other Chattells by common custome to their Executors.

2 The Lord loofeth the custody of the Body of his Ward when ever he giveth him or her in Matrimony : So that if it shall hap pen, the Ward being under age to become fingle the second time he can by no means

(h) Lil.1.2.6.4 recover him into his custody. (b)

Of Tutors or Over-feers.

TIT. XXIII.

MEN though full growne, and women though marriageable, were amongst the

the Romans to receive Tutors untill they arrived at twenty five years of age. Notwithstanding, that they are not so with us beyond the age of one and twenty, and that in cafe where they had not any before either in regard of their Tenure or necessity of the Law. However we include Tutors and Over-feers under the name of Guardians, although it is apparent, those to be more proper in (a) V.tit. 14. relation to the person, these to the Estate, Sed .4. in Inf.

1. To some also, the Law appoint Tutors nuptiarum 1. and Overleers, for by the Statute the King sciendum 20. hath the custody of the Lands of naturall 1deots, receiving the profis without waste and destruction, and finding them necessaries. without any regard had of whom the Lands are holden which after the death of the Ideots are to be restored to the right Heires, so that they cannot by any means be aliened by the Ideots or the Heires disinherited (b) Fleta (b) 17 Ed.2. affirms (e) that anciently Ideors were under the custody of their own Lords, But that for the many Exheredations that hapned: Their Guardianshipp was conferred by Parliament upon the King, yet with this Provifo, that the Lords of the Fee and those whom it concerned should loofe nothing which was their due. Either for Services, Rents Releifs, of their right of Guardianship, till they come to full age according to the condition of their Fce.

2. So also where it happens that any one who formerly had both memory and understanding becomes, Non compos mentis, as some

Brit. 167 . Stan. Prerog. c.9. Bract.1.5 .trac. 5 c.20.n.I. Dyer, 101.Com. 1.4. 126. (c) 1.1.c. II.

fhall take care, that the Lands and Tenements of such shall be kept without waste or destruction: And that he and his Family shall live competently and be maintained out of the profits of the same: And that the Remainder of their profits shall be reserved for their use. So that the said Lands and Tenements shall not be by any means alienated within the said time, nor the Revenues appropriated to the Kingsuse, and that if he shall happen to dy in such a condition, that then that said remainder of the said profits

(d) 17 E. 2.c. then that said remainder of the said profits 10. Bratt. 1.5. to be disposed of by the Ordinary, for the

tr.5.c.9.n.7. good of his Soule. (d)

Dyer, fol. 25 m. 3. Those who are naturally deaf and dumb 164. Cook, 1.4. or labour under any perpetuall diseate according to the opinion of some are necessari-

(e) Bratt. 1,5. ly to have Guardians. (e)

tr.3.c.6 n.6.8 4. Infants are not forced to receive Guartr.5.c.18.n.1. dians against their will except by reason of
their Fee, or any of the causes before mentioned, or in case of Suits in Law. And in
the latter case of rentimes there is not only
the next of Kinn assigned to assist the Infant
in acting but a Guardian likewise to afford

(f) well. 1.c. him help for his defence (f)

47. West. 2.c. 5. Notwithstanding which, no man as Guar-15. F.B. f. 27. dian to an Infant shall prosecute for him of

receive an Action without warrant, but another may as his Kinfman commence an action for him without express warrant, (g) not can an Infant disclaim that Guardian who

profecutes an action for him as being next of Kinn. (b)

(g) Id. ibid.

(h) Id. ibid.

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6. An Ideot born is not received to profecute or defend in any action by his Guardian or next of kinn, but is required alwaits to be present in his proper person.

(i) F.N.B.fol. 27.g.

Of the Security which is to be given by Guardians.

TIT. XXIV.

TE that is constituted sole Tutor or. Guardian by the Magistrate or Ordinary s bound by our Law to put in security. But efore he is admitted to his Office he makes Dath to administer all the affayres of his ard to his profit and benefit, to give a true nd faithfull Inventory of all his Goods, nd to exhibite it by a certain time, accoring as the Judge shall appoint, as alfoto ender an exact and true account of his Pfice when it shall be required from him. Besides all which he is to finde sit and able areties joyntly with himself, and severally y themselves to become bound for his true nd faithful administration of his Guardianhip.

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Of the excuses of Guardians.

TITXXV.

Offes of Guardians because no oneism upon this Office against his Will.

Of Guardians which may fall we der Suspition.

TIT. XXVI.

Of trusting Guardians. For he that give Estates to divers, whereof some are of a and some Infants, may lawfully appoint hose which are of age to be Guardians the Infants; but this will not stand in a shere beany cause of suspition, that they we contrive the death of the Infants, but sufficient is not admitted, if the gift be made Father or Mother or their lawfull Issue, it is otherwise where it is to Brother of the cle or Nephew; because of the right discording. (a)

their Fee, so long as they have the custo

(a) Bract.1.3.

fthe Land are bound to maintain and repaire all Houses, Parks, Warrens, Fishooles, Mills, and all things whatloever apertaining to the faid Land, out of the proits of the faid Land : And to render to the Heir when he shall come to age, his faid Land free from all Services of the Plough t leaft as free as he found it. Nor shall he ake any thing of the Land of the Heir as he eing under age, more then the ordinary cutomes and reasonable Services. And this vithout destruction or waste either of men or goods; which if he shall do, whether there oany prohibition precede or not, he shall oose his ward and pay Daniages. And delier up the Land for his default, to some difreet and lawfull men of his Fee or to the (b) Bract.1.2. next of Kynn. (b)

2. And it is true regularly, that no one 4.tr. 6.c. 19.n. hall remain in the custody of him who may 2. Mag. Char. e suspected that he will lay claim to the c. 4. & 5. nheritance, Whence it followes that if there e many Daughters and Heirs in Socage one of them shall be wards to the rest, but hey shall remain in the custody of their next of Kinn who are allyed to them in that line which the Inheritance cannot discend, but if they hold by Knights Service, they hall be all under the custody of another Capitall Lord [and not one alone under the Guard of another Lord by reason of the said suspition untill they come to per- (c) Bract. 1.2. feet age. (c)

c.37.n.6.&1. 2.c.5. n.8.

Institutes of the

(d) F.N.B. f. 27. H. 3. A Ward may profecute an Action of waste against his Guardian, and may constitute his Actorney in the Action. (d)

The end of the first Book.

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THE

Second Book of the In-

stitutes of the Lawes of

ENGLAND.

Of the division of things and the gaining a Property in things.

TIT. I.



EE have spoke before of the Persons and conditions of men and persons in Law.

We are therefore now by consequence to treat of things by dividing and distinguishing, that they may (a) Bract. l.1. the better be understood, c.12. in the be-

(a)

1. Now the first division of things, is this, that some are in Patrimony and Inheritance, and some not. Those which are of, or be-

longing to our Patrimony, and both more ables and immoveables, which we have like ty to make use of according to our wills an necessities. Rights and Services are nor poperly to be reckoned amongst Goods, but it

(b) Bract.ib.n. regard they are not extreneous, they my 2. Flet.1.3.c.1. the rather be accounted such. (b)

our Patrimony are things facred, religious

(c) Bract.ib.n. and common. (c)

3. By naturall right these things are tok esteemed as common. Running, water, it Air and Sea, and the Sea shores as accessor. For no one is prohibited comming toth Sea shoares, whilst he abstaines from Buildings and Villages, because by the Law of Nations the shoares are as common as the Sea: And therefore, those Buildings which shall be erected either in the Sea or shoare, are the Builders by the Law of Nations and in this case the soile follows the propriety of the building, although in others it be controlly the building, although in others it be controlly the building giving place and sollowing

(d) Brast. d.l. ry the building giving place 2.c.12.n.s. the property of the Soule (d)

4. Things which are to be esteemed publick are Rivers and Ports. And therefore the right of shing used to be free to all, a also the use of the banks are publick as Rivers themselves by the Law of Nations. Wherefore it is as free to every one to joyn. Shipps and fasten them unto them, to the their cables or topes to the Trees growing on them, to lay any burden upon them as its to fail or row in the Rivers themselves, but the property of them is their sto whose

eethey adione. And for that reason the rees which grow thereon are theirs likeife. And this is to be understood of those livers which have a perperuall and continu-Il courte, because those which are but tent- (e) Bract. 1.2. orary may be private, (e) but these which e.12. n.6. ere formerly the Peoples. And by our Law ansferd upon the Supream Power, as repreenting the person of all the People and con- (f) Plow.Caf. equently of the Common-wealth it felf (f) Reinyer & Foherefore at this day who foever disburdens gaffa. r unlades his Ship upon the banks of pub ck Rivers must pay custome, Hoc nomine, to he supream power or its deputed Officers e) nor can any man fish in publick Rivers rithout license from the supream power first brained. (b)

Where note the difference between ublick and common. Publick are taken for or those things which are the Peoples geerally, viz. Which are for the use of man nly. But those are common which are for

he use of all creatures. (i)

6. Those things are said universall and elong to the generallity (not to particuler Persons) which are in Cities, Theatres, Raes, and the like, which are common in Cities and are for the use and in the power of the Generality. But of things which belong and ppertain to the generallity, some are tearmed Venalia, not from the use but the power, under which they are and profit, as the lands and Servants of Cities so that they cannot (k) Brack. ib. e called any ones particularly. (k)

Some things there are which may many

(g)3 H.7.f.14

(h) F.B. f,88.

(i) Bract. ib.n 6. Brit, c.33 . Flet.1.3.c.1.

Brit ib.Flet .ib.

(1) Bract.ib.n.
10.& 1.3. tr.2
c.3.n.4,5,6:D
& Stu.f.157.
Brit.c.33.Flet.
1.1.c.43,44, &
47.& 1.3 c.1.
(m) Kitch.f.12
f.30.f.40.Stat
de Prerog. Reg.
c. 11.

waies be said not to be the goods of any one, as first by the Law of nature. Wild Beath, Birds, Fishes, and Men. Next by Judgmen, as things Sacred, religious and holy. The by accident as an Inheritance lying before it be entred upon or appropriated, and Wreck. By will, as any thing that is left and for saken, and by process of time as Treasure (1) but by our Law, Wrecks, things that are left and torsaken, and Treasure, belong to the publick Exchequer. (m)

8. Things facred are those which are duch fer apart by the Clergy, for Gods Service. As Churches and Gifts duely dedicated to holy uses; as Chalices, &c. Which are solidden to be alienated, except for the todemption of Captives; also Church yard and Chappells, and although structures happen to be dimolished, notwithstanding, the ground remaines sacred still. Now Sacras differs from Sacrasium, Sacrasium signifying only a place where holy things are laid, sand besides all these, the Kings High way in some sense is tearmed sacred, (0)

9. Christian Religion makes religious things almost the same with sacred, yet these are amongst us many noble families who have by the leave of the Ordinary and Parishoners, built Chappells near the Church, and have therein a right of buriall for themselves, so that none else might be interred in

them.

are such as are senced and garded from the injury of men, as that law is particularly called

(n) Braft ib.n.
9.& l.2.c.27.
n.2.& c.5.n.7.
Brit.c.33.
(o) Braft l.4.
tr. 1.c.16.n.9.
& c.28.& c.
38.& tr.3.c.9.
& l.5.tr.5.c.
10.Fl.l.3.c.1.

called Sanctio which laies a Panalry upon those who commit injuries, And of this fort are walls and gates of Cities, which we suppole so called, because if we may credit our ancient writers their way, a capitall punishment ordained for those who should injure them, either by violating or altering them, or climbing or Scaling them, or by any other way. In regard it seems an Act of hostility and not fufferable, to enter any other (p) Braib.n.9. way then by the gates, (p) but this punishment feems of late arbitrary, unlesse in time of Warr.

11. Now those things which every particuler man pollefleth are held and had, either by the Law of Nature, the Law of Nations, or the Law Civil, we shal therefore first treat of the most ancient which had their first rife, even with Mankind it felf. After which we shall discend to the Law Civill which was introduced afterwards ; namely, when Cities (q) Bratt. 1.2. were built, Magistrates created, and Lawes (.1.7.2. Brit c. began to be prescribed. (q)

12. Now dominion or propriety in things by the Lawes of Nature and Nations was first created by the occupation and possession of those things which did not properly belong toany particuler Person. Occupation in-cludes, Fishing, Hunting, Fowling, Inclofing, Seifing, (r) the Law of Nations puts the property of thingsthus gotten into the person who hath possession, but ours doth not. For there are many things which are the Kings by his Prerogative, (s) and there are (s) Bra.ib.n.2. many Statutes which put limitations both

(r) Bract ib.n. 2, 3. Brit. c. 33 Flet .1.3.6.2. Plow.fol.28.

(t) 4 H.7.15. to Fishing, (t) Powling, (w) and Hunting Eliz. 17.25 H (w) by which that ancient liberty which the 8.7. 13 E. 1.c. Law of Nations intitles us unto, become 47. 13 Eliz.c. bounded, custome also of places doth often 18. 31 H.S.I, in these alter common right.

17.

10. Dyer , fol. 10. 13 E.2.

Seu.l.1. c.5. (Z) 14 H. 8. f.

I. F.B f.86.

2. 3 E.3. c.t. 13. The meer perfuing and hunting of any 13 R.2. Star. 1. thing doth not make it mine; for although! c.19. I Eliz.c. fhould fo wound any beaft that it may benken, yet is it not mine untill I shall have (u.w) & Eliq, taken it, nay, it shall rather be his that can 6.21.13 H. 8. get polleffion of it in regard many things may 6.18. & 3 1 6.2 mtervene and happen which may hinder my 37 D.3.c.13. taking of it. So if a Dear shall fall into the 24 H. S.c. 10. Ginn or Snare which I shall fer up, form & 25.6.11. & eatch any thing, and I chance to take him 31.6.12.& 32. and hunt him by perfuing, he shall be mine 6.8,11. 3 & 4 if he come into my power, unlesse there bear E.6. c.7. 5 El. ny custome of Priviledge to the contrary, 6.21. & 23. c. (x)

14. So bees are by nature wild for if they 306. & 326; shall settle upon my Tree they are no more (x) 23 Eleg c. mine before I have hived them. Then the Birds which shall build their nests there, and Stat. 1.c. 13. 2 therefore if another shall hive them, they & 3 E.6.c. 14. shall be accounted his, yet the Chickinson & 17. Dyer, f. young ones of fuch Birds as buildin my 238. Trees are mine by right untill they can fly (y) F.B. f.86, away (y) so that if any one else thall take 37,89. Doct. of them away, he is liable to pay me Damages. (2) If a Iwarm of Bees forfake my hive, they are faid to be mine fo long as they continue in my fight and that the perfuing of them becomes not impossible, otherwise they are his that takes them. But yet who foever shall take them doth not make them his, if he

know

know whose they are, but commits These unlelle he intend restitution. And these are true unleffe where the particuler cuftome of (a) Bratt.1.2. any place makes an alteration. (a) c.12.n.3.Brit.

15. That which hath been spoken is to be c.33. Flet. 1.3. understood of those Creatures which remain c. z. Sed 2.

continually wild, but if any shall happen to be made tame, and by cuftome goe familiarly in and our, fly abroad and return as Dear, Swans, Peacocks, Pigeons and the like. There is another, rule to be observed for that they are to be understood, ours so long as they have any Inclination of returning. For when ever they cease to have any defire to return, they cease to be ours, and the inclination of returning is then faid to cease when the custome doth; and the fame is to be understood of Hens and Geese when ha- (b) Bratt. ib. ving been tame they become wild. (b)

16. But in the case of Hens and Geese which are bred in a House, the third rule holds good, namely, that although they fly away our of my fight, yet in what place foever they are, they are to be understood mine, and he committee Theft who detains them with an intention to gain. (c)

(c) Brad, ib.

17. And this Species of possession takes place also amongst those who are made Caprives, that if free men be brought into our Servirude and escape, they receive their pristine condition (d)

(d) Bratt.ib.

18, So hath it in those things that are common as in the Sea and its shoare. In stones and Gemms, and other things found on the shoare. (e)

(c) Bratt. ib. Brit.d.c.33. Flet. 1.3.6.2.

19. The

19. The second manner of gaining, which is by Jus gentium, and is a discreet or distinction rease, or secretly a Contrete or continued. And therefore what soever is borner comes from any sort of animals under or Subjection or power are absolutely gainst

(f) Bract. ib. Subiection Brit ib. Flet ib. unto us. (f)

adds unto our Land by overflowing is our by fus gentium, now this kinde of increases unknown, for that it is said to be added overflowing, which is so insensibly added that the time or times are insensible. (1)

(g) Bratt. ib. Brit.ib.Flet.ib. Dyer.fol.326.

21 But if this increase be not inpercep tible, but apparent, then it is otherwife: A in case the force and violence of a Rive should sever any part of your Inheriance,and joyn it to your Neighbours, yet undoubted ly it remaines yours still but if it shall remain long so ioynd, and the Trees which accomp nied it, take root in your Neighbors fee, from that time they seemed to be perfectly adde and gained to his Inheritance, yet according to some, there is a profitable claim given to the former owner: But this claim ceafeth & cause the very Superficies, is become anothers, and a Tree which is fed and nourished by another mans ground shall be esteemed his. (b)

(h) Bratt. ib. Brit ib.Flet.ib.

of an Island made by a River which is it case of an Island made by a River which is it be instituted in the middle of the River, it shall be in common to those who, pro indiviso, have the Inheritance near the bank on each side

he River, according to the latitude of each ee towards the Bank, But if it be nigher to ne fide then the other, then it is theirs only thich have the Inheritance on that fide neer (i) Bratt. ib. he Bank, (i)

23. But if an Island be made in the Ses, which feldome happens) the propriety is in he Occupier, not that another mans ground nd property reduced into an Island, is to be inderstood an Island; as if a River being livided at the upper end, incompafesh anohers Ground, and is again united; in this case the property remains in him in whom it ras. But this is to be taken in grounds not imited, for in those that are limited, overowings fignific nothing: Now those are linited to which tearms and bounds are afcried. Where it is distinguishable what is giren, what retained and left. Moreover an fland is not to be appropriated to limited possessions in the case of Vicinity, where the River is publick: But the property is rather in the Occupier, and confequently in the King by Prerogative (k)

24. And this kinde of accession is to be Flet. ib. understood in case where the Channell of a River is left by the River, the property of which shall be in them whose pollessions are next to the River bank, according to the latitude and extent of their possessions neer the bank; the property of the new Channell remaining with that of the River, namely in the publick, now in case where a River shall take away part of my Fee by his new Channell, and thall return again to its old; I can-

Brit ib. Flet ib.

(k) Brack. ib.

not

(1) Bratt. ib. Cromy. Juris. fol. 1cg.

not firially by Law challenge any thing to my own Fee in regard the property is them whose pulleflions are next the bank

Though in Equity I may. (1)

25. But in case a River shall not make am new Channellin my Grounds but only oreflow them, there the Species as to the property is not altered, and thus much for aced fion which is meerly providentiall.

26. There is also another kinde of Acors on which is naturall which by joyningon Species with another either of the fame or & vers kindes, either by fodering or cemeting, in which case the Minor shall give plan to the Major or more worthy or precious but if neither be more precious, then ever

(m) Bract. ib. one may claim his own. (m)

Flet.ib.

(n) Fulb. tit. Devises f. 39. Flet. ib.

27. The right of Acecsion rakes plus likewife in houses built, as if I build and thers materiall upon my Soil, I shall bet fleemed owner of the House because the propercy of what is built followes the Soile, (1) nor yet doth he that was owner of the matte cease to be owner still, nor yet can he take away, but he may recover double damage. And if the house thall fall he may challeng what was his, if he have not recovered dow ble; but on the other fide, if any one out of an evill intention build with his own mate rialls upon my ground, he is prefuned to give me his materially but if it be not through any evill intent, as supposing the ground to be his, I, who am owner of the foll thall pay unto him the price of his materials and his Workmens wages, now this which

hath been said, it to be understood where hat building is immoveable, for if it be moyeable it is otherwise. As for example, a new Barn of timber built or placed upon the Inheritance or Fee of John an Oakes thall not be understood to be the Barn of John an (0) Bract.ib.n. Oaks. (0)

And this very Species of Accession which f. 86. Perk tit. s by the Labour and Industry of man may be Dower 328. affigned even to Letters for letters though writ in gold follow the property of the Skins or papers in which they are written, as buildings do the property of the Soil on which they are built, (p) but it is otherwise in case (P) Bract.ib.n. of Pictures. For it were ridiculous that a 5. Plow. 223. pretious Picture should by accession intitle him to the property who was only owner of a vile and inconfiderable Table whereon it was drawn (q) and therefore the Table shall fol- (q) Bratt. ib: low the Picture.

29. So also in Textures for if any one shall interweave or imbrayder his Purple in my garment although his Purple be much more pretious then my garment, yet by the right of accession it shall follow the property of the Vestment.(r)

30. Likewise, the same Species of Accession in fructuaries and in those things whereof we have the use but not the property concerning the revenues of income of the inreale, s)

31. But there is another Species of accessi- Flet.1.3 6.1. on which is providentially naturall and is made by the cooperation of divine and humane nature from whence a property is acquired

4. Brat. c.33.

(r) Bratt. ib.

(s) Brack. ib.

quired , as for example, A. fowes another mans plant in his own Soil the property of the Plant shall be in A. and on the contian A. fowes his own Plant in the Inheritanced B. B. shall have the plant, provided in both cases that they take root, according to the verfe.

Quicquid plantatur feritur vell inadificam. Omne folo cedit, radices fi tamen egit. Whatever we do plant or build or fow, Follows the Soil, if they with roots do

(grow,

But before they have roots they are his who first had the property, and this is so undeniably true that if A. have a Tree which doth so much overcharge the Soil of B. that it takes rooting in it, the property shall ke in B. for reason will not permit that it should be in any other then in him in whole ground the roots grow, fo if a Tree be fet in the bounds of Lands, and the roots reach into anothers foil, the tree shalbe common nor shall it be permitted the Neighbour to cut up the roots, and this is to be underfrood in case where my tree puts forth its roots fo far into my Neighbours Soil, that without it, it cannot live or grow; for where it bath sufficient to maintainit (t) Erall ib.n. without those roots, it shall not be in Con-

6. Flet 1,3.c,2, mon. (t)

32. And by the same reason that Plants having taken roote, and immoveable buildings follow the property of the Soil,

by

Lawes of England.

by the same reason doth any kinde of grain when it shall be sown and take nourishment and grow in the ground, nor is it materials whether it came there by accident or not.

(u)

(u) Bract. ib.

33. There is also an accession by specifica-Brit.c.33. tion or changing the Species, as if a man create a new Species out of a substance which was anothers, the property shall be in him, that made the Species.

34. And in like manner by confounding, as in licquids, by confounding wine with hony. So may there be confounding also of Solids, although it be wrought with very much distinctly, viz. The Species, as Gold, Silver, Lead, Iron, the product of which shall be common whether they will be seperated or not) amongst those by whose desire the bodies or species were intermixed, so also in case of an intermixture purely accidentall, which will not admit of Seperation, but if it be possible to seperate the substances, then each shall have his peculiar part in weight and measure actording to that which he had in the originall and rude matter. (19)

35. But if one mans corn be mixed with anothers, the Corn shal not all be common, but
each one shal claim his share from the heap, ac
tording to his quantity or measure of Corn,
nor can there be any community in Corn; beause single bodis remain in their own proper
substances, as in case A his Herd intermixeth
with mine, it cannot be conceived that the
Herd should become common, and although
it be very difficult, & in a manner impossible

(w) Bract.d. c 3.n.c. Flet.l.3 there may be sufficient argument to give the to the claim of an individual part, a the whole heap of Corn were in comme Namely, that he may claim so much on heap as was his, now there is a different tween confounding and mixing, and that three particulers. For Species are said to mixed, and matters and substances, to be a founded. Also Species mixed remain int same substance and Species, but consound they are transferred into another man

(x) Braft.ib. (x)

of another whom hee beleeves to be them
owner of it, when indeed he is not, or in

Bona fide receive it of gift or upon any ther just consideration, Naturall Reasons

(y) Fulb. Ear- leth that the profits which he hath tecin gaines, f. 13.b. shall be his for his tillage and care, (1) & 14 Eli.311. this is not permitted to a wilfull Disc Oper. of another mans Inheritance. (3)

(2) Cook, l. 1. 37. Now it is much questioned when 98. Perk. 529. Tenant for life [which is almost all one stat. Glosefi.c. the Roman Fructuarij] hath any right. An. 6. Ed. 1. to profits and truits unreceived. And

Books distinguish between fruits grown

(a) Perk.f. 513 for as to thole they conclude that Tenant 514,515, 518, life may dispose them, either by his La 519, 520. Will and Testament, or otherwise, (a)

(b) Bract.ib.& 38. There is a propriety gained by b 1.3.tr.2.c.2.n. ding, as in case of Treasure found, (b) in 3. Plow. 315. by Treasure we mean an ancient hoards & 323. of Money or other Mettall, whose means

fo much worn out, that it hath not now ayowner; and fo by the Law of nature, it is is who found it, to exclude others, (c) other- (c) Flet.1.1.c. ife if any man for gain, fear, or to keep it, 43. idsandburieth any thing under ground; this hall not be faid a Treasure, and of this there nay be Theft committed. Treasure is suppoed the gift of fortune; and no one ought by he labour of his Servants to feek after it, or for it to dig up the earth, and feeing Treaure is no particuler mans goods, and was anliently the finders by the Law of nature, now y the Law of our Nation, it is become the (d) Brast. 1.3. lings, (d) and this is true for things found tr.2.c. 3.n.4. n the earth, but it is otherwise for things ound in the Sea, (e) as for other things (c) Brit. c. 17. which are found above ground, they remain heowners stil, if he make claim within a year ind a day, nor is the property in the finder intill he hath made publication of the things found, in the Markets, and Churches, next djoyning, (f) yet at this day if they be things nanimate, they escheat to the Lord of the Mannor for eyer, nor can any prescription of time entitle the finder unto them, (g) and the reason of difference is this: That animall things cannot be kept and maintained with- fur le Case, out charge, which is otherwise in inani-

39. Thole things which accrue unto us by Tradition or Livery, are ours by the Law of Nations: Nothing being more conforant to naturall Æquity, then to have the will of the Donor confirmed when it transfers any thing upon another, Now Tradition is a free tranf-

(f) Brit.ib.Dr. & Stw. 1.2.C. 38. Dyer 121. n.14.

(g) Brook, Act. 109, 113.

transferring of a corporeall thing, eitherd ones own or anothers, from person to person with ones own hand or anothers as administratory [provided it be with the will of the owner] into the hands of another And Tradition is nothing else in and

C. 2 ..

(h) Brall. 1.2. ther fense, but the Induction of a corporal c.18,7,2. Brit. thing into possession, (b) nor is it material c.40. Flet. 1.3. whether the Owner himself deliver the thing given or fold with his own hand, or another by his appointment as his Attorney, if himlel shall not be present, or a Messenger with la ters Patents of Attorney, intimating and containing the will of the Donor or Selle

(i) Bratt.1.2 . (1) c. 18.

> 40. Now the bare will of the Owners the case of Livery is sufficient for the trans ferring of any thing to another, as changing the cause of possession, Provided it bewin Solemnity, and that there doth not was Witness, as in cale a man lets a thing toam ther, or grants it for tearm of life or year and shall either sell or give the same un him afterwards, although he had it not at fit upon this Score, yet fince the Owner him felf fuffers him to injoy it upon this or and ther account, it becomes his. In the last manner, if any one be in possession of ano thers right, without a just precedent cause namely by Intrusion or disseifin, and the of ner wils that the Intruder or Disseisor shall have it, it shal be his although the owner were not possessed of it at all, it being supposed that possession and property in the thing came

came unto him by the owners Will, as from

him and by his own hands (4)

OB,

ni.

10

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5

41. Things fold and delivered are no other-c. 18.n.2. Lit. wife, the Buyers then as paying the feller 3.c. Releases. for them, or otherwise satisfying him as by Flet. 1.4.c.20 pledge or carnest, (1) unlesse the seller lets (1) Brast. 1.2.

him have it upon his Credit. (m)

41. Where Livery is to be given to any one either by the owner himself or his At-f.76.n.30. torney, of any house by it felf, or of any Messuage, by reason of a Fee, to that intent that the Donee should have the possession untilla certain Term with all the rights and Appurtenances: It is not needfull in this case to go round all the Land, or set ones foot in every part or parcell of it, but it sufficeth if Livery be given by a Doore or by the hasp or Ring of a doore; For by this means he shall be in possession of the whole by the intention and view, and by the consequences of possession, but if there be no house he may have seifin [as it is commonly called] by a staff or twigg, and the meer setting of the foot upon the Soil with a defire of polleffing and an intention of the Donor is sufficient, notwithstanding that it doth not immediately inure to take its effects, (n) but without Livery of Seisin a Free-hold pasfeth not, either by Feoffment, Gift, or Leafe. (0)

43. Those which the Romans cal'd Missilia, Doct. & Stu. or the Liberalities which Emperours and 7.f. 14. Lit.c. Attornment. Princes scattered among the People, are not so frequent with us as they were with them, yet we have some mentions of them which 206. to f.216

(k) Braft, l.2.
c.18.n,2.Lit,l.
3.c. Releases.
Flet, l.4.c.20.
(l) Braft, l.2.
c.27 n.1. Flet.
l.2.c.51. Dyer,
f.76.n.30.
(m) Dyer, f.30
n.203. Plow.f.
432.& f.5.& 9

(n) Bract. l.2. c.18. n.2. (o) Brit.c.33. Bract.l.2.c.19 Doct. & Stu.c. 7.f.14. Lit.c. Attornment. Perk. from f. 206. to f.216.

carry

carry the same Right with them, as when the Conduits of London at the Coronation of Kings or other fuch like folcomities in with Wine, every one hath a property inthe (p) Bratt. I.t. Wine he there takes. (p)

c. 12 .n. to.Fle.

1.1.0.43 & 47

(q) Bro. H.Eflray & waife.

(r) Kitch f. 12 b. n. 39.

(t) Brack l.x. c.12. N. 10. Fl. 1.1.6.43.8 47 (u) Brit.d.c.17

(w) Brit. ib.

44 Whatfoever is left and forfaken, ou Lawyers term a Waife, this was formerlyby naturall right the finders, but now by our custome it is the Kings, (q) that also it called a Waife when any perionall or movemble Chattell is felloniously taken and being

through the fear of the Felon left, hathm owner to claim it, (r) wherefore if any fud thing be found, it is the Kings or the Lords of the Mannor, to whom this liberry and

priviledge is granted by the King, yet fothat (s) Brit. c. 17. Rettitution is to lot and a day. (s) Restitution is to be made, if the Owner

45. So any beafts that are found straying in anyones ground follow the custome of things left, for even these also were by our ancient writers included under the name of Waifes (1) but others call them by a more particuler name, Estrayes (") which our Latinesrender, Extrabura : Because for the most part they break forth and stray against their owners will, and these after a year and a day, if not claimed by their Owners within a year and a day, Escheat to the King or the Lord of the Mannor where they were the ken, Provided they be duly cryed and proclaimed in the Neighbouring Markets. (w)

46. The fame is to be understood of things cast out of a ship in a Tempest to lighten the ship, or of such things which happen to fall

t of a Care when it runs, the owners not nowing of them, but in case of Shipwrack which we call a Wreck) where neither any the Pallengers, nor any Cart or Dogg ers from the Ship to the thoarcalive, what- (x) Brit.d.c. ever of the Goods or thip thall be cast up- 17. & westm. n the Land by the Sea, shall be the Kings 1. c.4. the Lords of the Fee, to whom the King (y) Brack. 1.5. traft. 5.

ath granted this priviledge. (x) 47. No man can have any property of c.25.2.3. Bro. ands in England before he be a free Deni- tit. Corporation en, (y) for that what soever is purchased by 26. Dyer, f.2. 11.8. & [.224.

n Alien is forfeited to the King. (7)

11,29. (Z) Bro. Denizen. 16.

Of things Corporeall, and Incorporeall.

TIT. II.

Here are moreover of things, some which are corporeall and some which are Incorporeal. Corporeal are such as may be touched, as Land, ground; things immoveable and moveable, which can move themselves, as living creatures and the like, or which may be moved.

Things which are Incorporeall are luch which can neither be feen nor toucht, as rights (a) Brack, 12. and Priviledges, the right of walking, a- c.12.n.3. Flet. ding, conveying of water, and the like. (a) 1.c.c.3.Plow. Now rights and Services are the same, but f. 170. have their appellations from a diverse re- (b) Brack.1.4. spect. (b) To this may be added the right of tr. 1.c. 37.

Pafturing,

(c) Id. ib. (d) Bro. Tenure, n. 15. & 18.

(c) Doct. & Stu.c.30.

(f) Bract. 1.4. tr.1.6.37.8 1. 2.6.23. Mynfin. ad rubr.Inftit. (g) Id. ib.

(h) Gothof ad rubr. w.de agu. rerum dominio. Lit. 1.1. c.1. Bract.1.2. 6 21 & 23 Brit. C:40

(i) Bract.1.4. tr. I . C. 27 . n. 6. & tr.4.c.4.Fl. i.I.C. 12.

[k] Anto. Con . in Fcodorum Comment. c.3. Mattheus Wefenbecius in tr. de feodis c. 1.

Pafturing, which we cal common of Paffun Fishing, digging of Turfes, felling in other mens Woods, the right of presentationto: benefice distinct from an Estate of Inheri tance, which is by us called Pifcaryes, Turn ryes, Estovers, (c) Advowsons in grosse. And laftly an Annual Rent, (e) now this ca not be faid properly to be in possession, but it were. (f)

1. For things moveable or immoveable out Law determineth, Quatenus to the Person, and as they either are or are not in the porer or property of man, (g) Now property ist full and absolute right of disposing of, or le ling any thing corporeall, unless the Laws any condition hinder, (b) Possession or So fure, In Dominico, &c. Is properly of corp. reall things, and incorporeal we only fays of Fee. For that they are not absolutely at quired by Livery of Seisin, but as it were now this Seifure, In Dominico, &c. Is two fold. Direct, or meerly for use. Direct, [which is also rearmed absolute] is that which comprehends both Property and uk, The other confifts folely in the benefit and ule of a thing. (i)

2. The English have a full Dominion and Power of things corporeal and moveable, but not of immoveable if we except the supream power and right of the Crown; for the Sub-1: Et hath not an absolute freehold in their Lands and Tenements, but a Fee only, and that fee doth not comprise so absolute a power, appears, not only by those Authors who write of Fees, (k) but even by Liteleton himfelf,

himself, when he saies that such a one was feised of such an Estate in his Demesne as of Fee, by which words he affirms the highest and fullest title to be exprest. And these words, (as of Fee) do abare fomewhat of an bsolute power, and argue a Tenure from a superiour, but that these words are some. (1) In 27 H.8 times referred to the Kings Demelne, (1) is either from the ignorance of speaking and applying; or elfe that distinction is maintained by which some will have a double acceptation of the word Fee, viz. One by which man holds an immoveable thing by any Title to him and his Heires. The other by which one holds from another by Rent or Service, or both, (m) whereas Fee in the fecond acceptation is never without the Oath of Fealty, (n) which the King never gave to any one as having an absolute Power. (0)

3. Fee which is in latine Frodum, and by some Feedum, comes from the German [Fief] which fignifieth an Inheritance held of another, (p) and is by those that write of Fees defined to be an immoveable thing given to another, in such a manner that the Property continues in the Power of the Donor, but the benefit and use is to the Donce, and his Heires, Males or Females for ever. So long as the Donee and his heires doc faithfully their Services to the Lord, (q) fo that Fidelity or Fealty is the foundation of Fee and nothing else. Yet it often hapneth that it is not bellowed Gratis, but for some small consideration of Money in the name of Rent,

(m) Flet.1.5. (n) Termes of the Law, V. Fealty. Fulb. Paral. c. Seigniority, f. 19.b. (o) Fort.c.9. Bract .1.1.c.8. Brit. in Prami. (p) Hottoman. b. disput.c. II.

(q) Anto. Contius in Com. Sup. feod.c.3.

(t) Duay. in Com Sup. feod. 6.12.Smyth. Com. 1.3. c.8. (s) Bract . 1.4. tr.3.c.9.n.6. Lit. 1. 1. c. 1.

Rent, or for Services, (r) but we underfland by Fee, all which we hold to us and our Hen (5)

4. Fee, as it is taken for an Inheritance held of another, is held either of the kine or a Subiect, or (that we may ute our on Phrase) a common person. Fees that are held of the King are double, either in right of his Crown (which we call Tenure in Cap te) or of fome Honour or Mannor apperta ning to the Crown : But a Subject although he may have others who hold of him in Fe from whom he may exact Fealty, yet himlet is either mediately or immediately Feodin to the King, for all the Land of this King donse which is not held of others by Services is held of the King and belongs to him, eith as ancient Demefne, escheats, or perquifites.

5. Fee is divided into many Species, or ther from the Effect, or from some caused ficient or formall, but we shall only discount breifly here of those which we meet with mol

frequently in our Books.

(t) Duarib.

11.c.1.& 34.

1.2.6.1.

6. Fee therefore is either Leige or nonleige fome Feodists (t) will have it to comt from the Italian word [Liga] which fignife a Band or League, and that because ittid and obliges the Vallal, For Leige is properly where any one swears Fealty to his Lord non-Liege is when with the exception of nother. The first is due only to the King (u) 10 R.2. & the later to common persons. (n)

7. Again, Fee is either Royall or not & 35. c.3. Lit. Royall. Royall, is the greater, for that it hath fornewhat of Royalty in it, as from

whence

hence any one is instituted from the King eing absolute, without acknowledging a suriour. Of this fort are those which had a ignity or Honour conjoyned with the powof their Priviledges, and are by us stiled berties or Prerogatives Royall; as where e King grants by his Charter to any Sub-At the view of a Franck Pledge, the Pleas Impranding, the amendment of the faults Affife, the adjudging of Robbers, as infangeife and ourtangtheife, Soc, Sac, Tol, Theam. o punish by the Gallows, or other punishents which the execution of Judgement all require Goods of Felons, and which pertain to the Peace, and consequently to (w) Brast. 1.2.

e Crown. (19) Wrecks of the Sea, Whales, c.f.n.7.&.c. turgeons, Free warren, Fayre, (x) and those 24.8 1.3.tr.2. ther things which fall within the Kings c.35. rerogative. But of these Fees there are (x) Bratt 1.4. th us certain degrees, fince some have a tt. 1. 6.46. eater number, some a lesser granted unto

The first, the Principallity of Wales claims right, (y) which from the time of Edward (y) Polid. Vir. e first did belong to the Kings eldest Son. in ed. 1. f. 3434 nd the second is claimed by the foure Pa- lin. 28. tinates or Counties Palatine, Lancaster, (z) 5 Elixlo. urham, Cheffer, and Ely. (2).

And these have those Fees which we cal- c.1. 27 H.8.c. d Honors which the King (besides the Juris- 25. ctions contingent to Courts Barons) hath anted some, though not all these Royall- (a) 31 H.8.6.

es out of his Munificence.(a) 8. Thirdly, Fee is either noble or Ignoble, 38. & 37.6.

oble is that which hath any Dignity an- 18.

23. 17 Ed.4.

5.8 33.6.37

(b) Perk. 670. Fulb. par. Seig. f. 18. Kitch. f. 4

next to it, or which enobles the Possessor concludes him to be noble. And of the fort with usare those which we cal Manno whose Lords have some Jurisdictions, thou not Royal over those which hold of their some Ignoble, is that which depends of such Mannor, and is granted to Countryment

their Heires for some base Service; this commonly called Free-hold.

*Homage Auncestrell.

(c) Lind. 2. c. 7.

(d) Id.ib. & new terms, tit. Hom. Auncest.

(c) Duar.com. in conf. feod.c. 9. Fourthly, Fee is either new or an ent * new, is there where any one is fifte all invested by the cheise Lord of the hand that either by the Curtesy of the Lord or for Money paid to the former seedan for he is the first of a new Family, who yell Homage and Fealty, (c) ancient Fee is whe the Feodary and his Ancestors, time out mind, have held such a Fee, and here these dists place a Medium between these two paternal Fee which comes by four degrees Discent, and they define that to be the a cient which discends from more. (e)

and Laick or Seculer. Ecclesiastick is is which is possessed either by Ecclesiastic persons or which belongs to Churches, Lathat which is held by Lay persons, and cambbe possessed by Ecclesiastick, and indeed Fees as with us laick, unless they become ther by some speciall grant from the king which we call coining to Marsancia.

(f) Mag.Chav. c.36. 18E 3. Stat.3.c.3.15 R.2.c.5. Pol. Virg.l.17.Eng. Hil.

which we call giving to Mortmain. (f)
11. Sixthly, Fee is distinguished in Masculine and Feminine. Masculine is the which is given to the Feodary, and the He Males of his Body, and of this kind in the He Males of his Body, and of this kind in the He

ofe of Dukes, Marqueffes, Earles, Viscounts, d Barons, for the most parr. Which defect of Heirs Males are extinguished. dreturn into the supremacy, from whence ey Issued, but these are at this day rather itles of Honour then Fees, in regard they e for the most part conferred without Fees. emenine, is that which may discend to the male Iffue, as when it is given indefinitely the Feodary and his Heires, and fothat r default of Heires males it may come to (g) Bratt. 1.2. ne females and their Iffue.(e)

12. Lastly, Fee is either pure or simple, or onditionall. Simple is that which is held ya simple and perperuall Right to the Feoary and his Heires for ever. Conditionall, that which is granted to the Feodary and ach or fuch Heirs, for default of which it reurns to the Donor and his Heirs, and thereore he that hath Lands given to him and his Vife, and to his Heires begotten of her, in afe the dy without Ifiue before him, is called enant in tail after hope or possibility of Islue xtinct For this kind of Fee with us is called fee-tail, comming from the French word Tallier] to cur, part, or divide, as if we hould say a Fee by some means severed or diminished. (b)

13. And this kinde of Fee is double, viz. & 1 Inflit. Jur. Taile generall and Taile speciall. Generall com.c. 11.&13 Taile is where a Fee is given to the Feodary and the Heirs of him lawfully begotten or to be begotten, for in this case the Children of either Wife, whether firft, fecond, or third, shall inherit: speciall Taile is where a

c.34. & 1.1 6.

(h) Lit.!.I.c.I

2. C.I.

Fee is given to the Feodary, and his Will (1) Lit.ib.Inft. and to the Heirs of either of them (1) or [4 Jur.c.12 West. cording to some when it is given to him an his Wate and one Heir of their Bodys lawful ly to be begotten, and one Heir of that He (m) Perk. 171 only, (m) but this, whether it be properly be filed a Fee for want of perpetuity man be doubted.

(n) Lit.1.3.c.3 Inft. Jur. com. c. 15.

(p) Id. c.2.

(q)Id.c.4.Inft. Jur. com. c. 15. (r) Vid. N.b.f. 6. Dyer, f. 30. 2.209. (s) Id.f.41.

(t) 28 Ed.I. Stat. 3. c.8. (u) Vid.N.B. fel.8.

(w) Lit. 1.1.c. I. Bro. tit. Tenures, 105.

14. Now a Fee is not limited to one For dary, but may be polletled by more, foth they are called Pateners, Joynt-Tenants, o Tenants in Common. (n) Partners are cities by Law or custome, by Law are Sisters Co heires, because the Heires Males being de they equally succeed their Parents into (o) Id.c.1.&3 Fee, (o) by custome are Brothers in man Counties, especially in Kent, from the Co stome of Gavelkind, called to from the quality of apportioning the Inheritance Joynt-Tenants are they which hold Land or Tenements by one and the fame Titte but not bereditary. Tenants in common # tholewhich possess Lands or Tenements In indiviso, by divers Titles, as in case one le Heire sells her part to a stranger, he is M Joynt-Tenant with the other Partners, W is called Tenant in common. (q)

13. A Fee with us is not only of Corpo rall things but incorporall also, for them stody of a Forrest, (r) Prison, (s) or County (t) may be granted to one in Fee, and the same may be said of an annuall Rent, (and of an advowson severed and not apper taining to any Mannor, which we call an At vowson in gross (w) now there are many fer

vice

vices percaining to a Fee, which we shall

mention in the next Chapter.

16. There are belonging even as it were to the very nature of Fees, Fee farm, free farm, and free Tenement, Fee farm is a Tenure of Lands and Tenements granted to any one and his Heirs for a yearly Rent, which equals the third, (x) or at the least the fourth part, (y) of the true value without any cther Services then what are expressed in a Charter of Feoffment, (2) some ashrm that Fee farm can only be granted for the life of the Farmer, and tome will have it Fealty although not expressed (a) in the Foofment, and others that reasonable releise (b) is due (a) New terms of right from the Fee-Farmer to the Donor, of the Law. but the condition of this Tenure is fuch, that (b) Brack 1.2. if Rent be not paid by the Tenant for the c.39. n.9. space of two years, then the Lord or Feoffer may recover the Lands to him and his Heires upon his action.

17. Britton makes free farm where Lands and Tenements are so given that the nature of Fee by Feoffment is changed from Knights service to certain annuall Service, so that there is neither Marriage nor Releife requirable, nor any other fervice expressed in the Feofiment (c) but I do not remem- (c) Brit. c.66. ber that I have read this in any other Au-

18. Free Tenement or free-hold is, where Lands and Tenements are held only for life of the Tenant, and fuch a Tenant is faid to (d) Dyerf. 221. hold, In Dominico suo ut de libero Tenemento, n.19.& f.153.
(d) But if it shall be said that Fee is natural n. 10.

(x) F.N.b. fol. 110. b. (y) Old Tenure ver. Fee farm. (z) well. part. 1. (mb.463.

(e) Inft. Jur. ly a Free-hold. I shall not deny it, only mul comic. 10. Lit. add, that it is also somewhat more, because 1.1.c.6.Bratt. 1. perpetuall, (e) but of that Free-hold whichis 4 tr. 1. c. 37. meant here there are two kinds. One which (f) Bract. 1.5. is for tearm of life even by the very custome tr.5. c.30. n.7. and Law, the other which is so only by agree Flet,1.6. c.ult. ment, Of the first fort are Tenants by the Cu-Dr. & S tu. 1.1. tely of England, and renants in Dower, for fud c.7.& 1.2.c.15 is the Civillity and courtely of our nation, Dyer, fol.25.n. that if a man marry a woman that is an Hei, 159.8 f.95.n. and have Isue by her, born alive, that Land 35.In. 7.co.c. 8 of which he is feifed in right of his Wifein (g) Spec. Juft. her life time he shall hold after her death for tearm of his own life, (f) which Law somes (h) Lit.1.1.c.9 scribe to Henry the first, (g) a woman alle (i) F. N.b. fo. whose Husband in his life time was seisedia 150.P. Bratt. 1. Fee, shall have the third part of his Estate, 4.7.6. c.13.n. he being dead, and in some places the hally 2. Dr. & Stu. (b) in some the whole for her Dower, (i) if # Bri. I. c. 10. least the be nine years old that the may claim (k) Lit.l.1.c.4 a Dower: (k) there is another fort of Down Flet.1.5.c.22. which is free-hold alfo, namely Dower which (1) Lit.1.1.6.4. is by content, which is that that is agreed of Inft. Jur. com. c before marriage at the Church door, or other-9.Fled. 5.6.22 wife between the man and Wife, (1) breifly all Brac. 1.2.6.39. Lands and Tenements which are either by (m) Inft. Jur. bargain, gift, or any other contract, held for com.c.6 Bract. term of ones own life or anothers, are compre 1.2.c.5.n.7. hended under the name of Free-hold. (m) (n) Dyer f. 213 19. And as Fee (n) fo free Tenement or n.42. fol. 288. free-hold may be of a thing incorporall, asan 2.55. office for life. (0)

(0) Bro.tit.Te- Thus have I given you a description ofenures,n.25. states in Fee, Inheritances, and Free-holds, Dyer, f.211,n. the third is a kind of possession or Tenute

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comprehended

Lawes of England.

mprehended under the name of Chattells alls, and they are those which we hold Tearm of years, or at the will of another. enant at will is two fold, viz, either by comon Law, or by the custome of any Mannor, ich is by Copy of the Court Roll, or by rge, (p) But this kinde we referr to the Com c.2.3. Lit. hapter of uses. Of which hereafter (q) we 1.1.c.9. Kitch. all speake.

(p) Inf. Jur. fo. 102.b. Coo.l. 3.case Heydon fo.8.a.b.&f.9. (q)c.4.of this

Of the Services which Inheritances are bound unto.

TIT III.

Ecause Services are reckoned amongst Othose things which are tearmed incorpo-I, we shall take a view of them; now there a certain service or Servirude which subits one man to another, (a) but it is not (a) Sec.1.1.c. this which wee intend here to treat of, but that which subjects one Estate or Fee unto other. Yet is it like that other which renrs one man a Servant to another, for as at constitution is called, Jus Gentium, the aw of Nations, which against nature subets a man to the Power of another, so may also be said of Service or that constitution hich subjects one house to another, and one state to another. And thus Services may divided into such as appertain to Cities Id luch as are Rurall, (b) those which be- (b) Brac,1.4. ing to Cities, and for the most part such as the

[c] Bract.ib.

the Civil Law mentions, namely fuch an inherent in the very buildings, and the fore called from the City Fees, because call all buildings City Inheritances, those built in Villiages. (c) Of this kind are the not to build a House higher, not to him lights or prospects, to convey and keepan Gutters and fincks from the yard or He of ones Neighbour, to lay a prop upon ther mans Wall or ground for the support cance of a House, to beare an Incumberan to have a Way, Road, or Paflage. For thou a Way and Road be Rurall & Country & vices, yet are they City also, when apply to City Inheritances. For it often happe that a neighbour hath a power and libra of paffing through a Yard belonging to a House, or of going up ones staires to own chamber, Rutafare fuch as are not int rent to buildings but are wholly with them. And thefe also are almost the la which the Civill Law reckons [if we exam those which the customes of Fees have into duced] as a Road, Parh-way, Aqua dull, drawing of water, folding of Carrell, path ring of Cattell, quenching of Lime, digg of Sand, taking of Stone, and the like. No both the kindes of Services are either realls personall, with relation to the thing of po ion to whom they are due.

[d] Dyer fo. 248. n. 80. & fo.319. n. 7.

[c] Fulb.
division seign.
and services f.
20. b.

I. Fee Servirude which both by our fee difts and Lawyers is called Service, is eith military and noble, or Rustick and Ignoble (e) military is that which performs some directly belonging to military discipline, or some

oth

other thing that is honorable, and this also is double, one which is due to the King only, (f) the other to the Lord of the Fee, notwith- (f) Lit.1.2.c.8 standing that he be Feodary to another that which is due to the King is double alfo, name-

by Serjeanty and Castle-gard.

3. Serjeanty is either Grand or Petit, Grand is where any one in the name of his Fee is personally bound to persorm any Office or other honorable thing to the King, (e) which some also affirm may be due to a common Person (b) of this kinde is the bea- 3.0.16. ring the Kings Standard or Spear in Warr, [h] Bract.1.2.c. the leading & conduct of his Army, the performing the Office of Martiall, the founding of a Horn at the incursion of any of the Kings Northern Enemies, to fend an armed man, if himfelf will not goe, to fight under the King when ever necessity shall require, within the four Seas, to carry the Kings Sword before him at his Coronation, to perform the Offices of Sewer, Tafter, Carver, Butler, or Chamber laine. (i) And in such [i] coo. 1.2. Services all the Barons in ancient time were cafe Cromwell obliged.

3. Perit Serjeanty is that which renders to the King as an acknowledgement of the Tenure yearly, a Bow, Spear, Dagger, a paire of Gantlets, or a pair of gold Spurrs, an Arrow, a Horse, or any such small thing which belongs to War. Now he that holds luch e Fee, doth not perform any perfonall Dury but rather Patrimoniall and reall, and that cerrain: And therefore differs somewhat from the very nature of a military Ser-

Le Jid.ib. Flet. 1.1.c.10. and 1. 35.2.6.

fo.81.a.

to

W

(k) Lit.1.2, c.9. Inft. Jur . Com. 27.Broo.lit. Tenures 69. (1) 1.1.2.11.

vice, having a property of a different Specie (k) but Fleta will not have this duty exceed the value of half a mark. (1)

4. Caftle-gard we have defined to beale vice due to the King only. Which is origi hally true, because no man can crectale file or Fort in the Kingdome without the Kings License; but in case the King gran teth a Castle with all the liberties belonging to it, unto a Subject, he grants Caftle-gard alfo if there, be any fuch Service due unto And for this reason this Service may as well belong to a Subject as the right of a Fortel (m) Manwood (m) It is a Service confifting in fortifying and defending any Castle of the Kingsa another Lords as often as the Feodary that require. And this is properly Knights St. vice when it requires the Person of the To mant, but when it is converted into a certain pecuniary mulch, payable every year forth fortifying and guarding of a Castle, it is a tered from the nature of Knights Service.

par. 1.de. Jur. forfet.pag.87. Cov.col.4.fol. 88.a.and Lit. c. Socage.

(n) Tit. ib. Inft com. c. 27 . Bro. tit. Tenures n. 5 8.

F.n.b. fo.259. A.

(o) Plow.fo. 126. 129.

(p Lit.1.2.c.3. (q) Camd. Brit. III.

(r)1.Ed.1.c.

[s] Smiths. Com. .c.18.

5. The second fort of Knights Service of Military which is due to common person as well as to the King, is called Scutage (1) from Sculum, a sheild. And he that holds by this is obliged at his own Charges for acertain number of daies to follow his Lorda the Warrs against the Scors: (p) They who hold by an intire and whole Knights Fa which some determine to be 683. Acres Land, some eight hundred Acres, some filteen pounds Sterling, some twenty pounds (1) and others forty pounds, (1) are bound to serve for the space of forty dayes,(1) they (1) Bro. Tewhich hold but by halfe a Knights Fee twen-nures n. 19.

ty daies, and so accordingly, (n)

(u Lit.1.2.6,1.

6. Now that certain differences between Lords and Feodaries, as well concerning Armes as the time of Serving, viz, whether from the time of shewing or perfecting, to begin, might be removed, it appears in most places, that it is by joynt consent of Lords and Tenants agreed, that the Tenants shall pay yearly a certain fumm of Money to their Lords according to the value of their Fee, and so to be freed from personall duties, (w) from whence the thing it felf feems fo (widib. changed by degrees, that that service which with our Ancestors was so incertain, is in most Fees at this day reduced to certainty and is called Scutage certain, (x) that incertain kinde being in divers Mannors quite (x) Lit.1,2.0.5. extinct, now this certain Scutage is Socage.

7. There are also other reall Services nures 28.29. which attend a Knights Fee, as the shadow doth the Body, as Homage, Fealty, Custody of Land and Heires, Releife, Marriage, (7) for these no time hath hitherto exterminated. (a)

(z) Brac.1.2.c. 35 . Lit. L. 2 . C. 4 .

-8. Homage which the Feodifts call also, (a Polid ving. Hominium, (b) is a reall Service, (c) which hift.ang. 16. the Feodary yeilds regularly to his Lord at (b) Hottom. his first institution; by prostrating himself dif. de feed 3. on both Knees at his Feet with his head un- (c) Brusc. 66. covered, ioining his hands and putting spec. Infi.b.3. them between his Lords, who remains fitting, Flet. 1.3.6.26. and promuncing these words or to the same

effect.

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c.35. n.8.9, 68. [e]! 9Spec.9. Inft.1.1.

effect. Hear Sir, I become your man from this day forward of Life and Limbe, and d earthly worship, and shall bear you Faithful the Lands I hold of you (and it it be not the King that receives the Homage) faving al wates the faith which I owe unto our Sove raigne Lord the King, so God me help, and the Contents of this Booke, which faid, the [d] Bract. 1. 2. Lord shall kisse him. (d) 9. Ranulphus de Glanville, denieth, that

Lit. feet. z.l.1. Bithop who is confecrated, or a Woman may Int. Com.c. 23. do Homage. [e] But Fitzberbert [f] accor-17. E. 2. Brit. c. ding to the Rule in the Register affirms, that a woman it fingle may fivear Homage and Fealty to the King, when from him theere ceives Livery of her Lands, and our more [f]N.R.258.f. modern Authors hold, that both Clergy and Women are subject to this Service, although the termes of expression is a little different, For a Clergy man for that he hath fethinfelfa part for the more speciall service of Od useth these words. I do Homage to you and shall bear your Faith for the Lands and It nements which I hold of you, faving alwais the Faith which I owe unto the King out Soveraine;[e] and a fingle woman doing Homage doth not fay unto her Lord, I become your Woman, for that it is not convenient that the should be another mans woman, then her Husbands, whom the shall marry. But the shall pronounce the same words which are prescribed to the Clergy, (b) and a wo man who is married shall do Homage by her Husband. (i)

[g] Int. Com. c.23.Lit.l.2.c. I.

[h] Id.ib.

[i] Id.ib.

ro. If it happen that any one holds divers Fees

ees by Knights Service of diverfe Lords, he hall do Homage to them all, but shall use nese words in the end, saving the faith which owe unto our Soveraine Lord the King, and nto my other Lords. (k)

11. Now it is to be understood that Ho-nage is alwaies annexed to Knights service, ut not folely to it, for Tenant in Socage [1] Brat.1,2.6.

hay also do it. (1)

12. Homage is divided into new, and antient [called Aunceftrell] new is that which sperformed by him who hatha new Fce, (m) [m] Instit Com. neient by him who hath an ancient one, c.28.Lit.l.2.c. nd that ancient hath a double effect, one 7. hat the Lord shall secure to his Tenant his ftate or fee, or (as our Authors fay) shall warantit against all men : The other, that he hall fave him quiet and harmlesse from any bervices of another Lord, at least in respect r relation to that Fee.

13. Fealty which our Authors also call [n] Brit.c. 66. Fiducia, is a reall Service [n] due from evey Tenant to his Lord at his first induction, whether the Fee be noble or ignoble, for fuch s the disposition of this contract, that whoe- [o] Smith Com. ver holds by Fealty, only holds the most 1.3.c.8. reely of any, one except the King, [6] for no [p]Lit.1.2.6.5.

Subie & can hold without Fealty, [p] and an- west. Simbol.l. iently he that broke faith with his Lord did 2. Sec 303. orthwith forfeit his Estate. [q]

14. Fealty is double, one is generall, con- tr.3.c. 6.n.3. irmed by the Oath of every Subject to the [r] Le grand epremacy. The other speciall; due unto the constumier de ord of the Foe, (r) the first is constantly ex- Normand B. Fle.

cted at Sheriffs Courts, and view offrank- 1.3.c.16. pledge

[k] id.ib.

35.1.6.

(s)Brac.1.3.tr.

(t) id.ib.Flet.

(u)Brac.cod. Flet.cod. (w)c.12.

(x) Lit, l.2.

Pledge or Court Lects, from all which inthe verge or precinct of the County or Leet, who are twelve years old, otherwise they have to warrant to continue in their Estates, (s) we our Ancestors more ancient used not to inpose this Oath upon any, under fourten or fifteen (t) years of age, the form of which Brallen thus explaines. They shall swee that they will not receive or entertain, perfons out-lawed, Murderers, Robbers, of Burglaries. Nor that they will consent of connive at them or their Receivers, and that if they shall know any such, they will attad them: and that if they shall hear any He and Cry, they shall immediately follow with their Family and Servants, (u) and Britte more breifely, (w) when he faith that the shall fwear to bear faith, unto the King, and that they shall neither be Felons themselve nor confent to felonies.

One which is proper to freemen, the other to Villaines. When a freeman swears sealing to his Lord, he laies his right hand upon the Book and saith as followeth, Know you this my Lord N. that J. M. shall be saithfull and true unto you, and saith to you shall bear for the Landswhich I hold of you at the times assigned; So help me God and all Saints. (x) When a Villaine swears fealty, hee shall holde his right hand a little higher then the Booke, so that he touch it not, and shall say. Know you this my Lord N. that J. M. shall from this day forward be true and saithfull to you, and saith ward be true and saithfull to you, and faith

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2 . Spec. Infl. 1.

to you, shall beare for the Land which I hold of you in Villainage, and I shall be justified by you in body and goods, so help me God

and all Saints, (y)

16. Custody or Guard is a reall service (y) 14. E. 1.c. proper to a Knights fee, by which the Lord hath the guard and care of the fee, and that 3. to his owne use, without giving any account during the minority of the Infant, his Tenant: As also the Education and Guard of the Body of the Heir. Now every one is with usan Infant till 21, yeares of age, if a Male; for our Law prefumes, that Knights fervice cannot be duely performed till that age. (2) (2) Fortefc.c. But we have spoken enough of this already : 44. Only this we shall adde, That the Lord may, ifhe please, alien this his title of Guardianthip as wel as any other thing which he hath; whence it is, that there is a double Guardian, namely, one of Right, as the Lord of the fee : The other in Fair, which is, he to whom the Lord hath aliened the Guard of the Heir and (a) Inft. com. Lands, or of the Heir only. (a) 6.24.

17. Releife is a reall service or Patrimo- (b) Coo. 1. 3. niall (though some call it aprly a fruit or be- case Penantes, neficiall profit of a service) (b) due both to fo.66.a. Knights service (c) and Socage. By which (c) Brac.1.2.c. the Feodary, Tenant by Knights service, 4.Lit.1.2. C. 4. whether male or female, being at full age at Britic. 66. folthe death of the Ancestor (viz. the male 27. 165.4. Flet. 1.3 the female 14. years of age) is obliged to pay c. 17. a certain summe of money. Tenant in So- (d) Lit.1.2.c.5 cage paying fo much for Releife as he payes 19.H.7. c. 15. yearly by way of Rent to his Lord. Ar what Bro. Tenures, age soever hee be at the death of his Ance- 76 Flet. 1.3.c.

ftor, 17.

ftor, & that without delay, (e) so that the fift

(e) Dr.Stu.l.1 c.7.Flet.l.1.c.

(f) Flet. 1.3.c.

17. (g) Littl.!.2.c.

5.

year he payeth his Rent double, one by way of Releif, the other part by way of Rent (f), For the Lord may immediately distrain, that is, take whatever he finds upon the Estate by way of pledy, untill he shall be fatisfied for his Releife (g). So if one hold by fealty, and a pound of Pepper, the Heir shall pay the first yeare two pounds of Pepper. And the Law is the same, where the Tenant payes for his Rent yearly a certain number of Capons of Hens, or a pair of Gloves, or so many bullels of Corn, or the like. But if in regard of the season the Tenant cannot pay Releist presently, then the Lord ought to expedimtill a convenient time. As in case heebe bound to pay a Rofe, or a bushell of Roles at the Feaft of St Jobs Baptift : Here, if he dye in Winter, the Heir ought not to be diffreyned by the Lord, untill the season come that Rosesmay be had (b). This the Feodists de fine to be a Present or Gratuity which the new Vassall bestows upon his Lord for admission upon the death of another : Or for 1ny other cause which shall occasion the Estate to come unto him, in regard it is now taken up by a new one (i).

(h) Littl. ib.

(i) Hotoman, verb. feodalis ver. Relevium.

18. And it is to be observed, that the Heirs of Earls or Barons, ar others, that hold of the King in Capite (that is, in right of his Crown) by Knights service. If they are at full age at the death of their Ancestors, shall pay their accustomed Releife, Viz. an Earle 100. pounds, a Baron an Hundred Marks. The Heir of a Knight for one Knights Fee

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100, shillings: And if there be any who hold by a double Knights fee 200. shillings, and to according to the rate, (k) which is also (k) Mag. Ch.e. rue in the cases of other Lords of Fees. (1)

19. The Ancients derived this word Re- 6.24. Fletd. 3. Beife, a Relevando, because the Inheritance c. 17. which lay still by the death of the Ancestor, 1 Brac. 1.2.c. was raised up into the hands of the Heir : 36. Brit. c.69. And for this raising up, there should be a cerrain fine or acknowledgment paid by the Heir,

and this they termed Releif. (m)

20. Marriage is a reall fervice belonging Brit. ib. to a Knights fee, by which the Lord of the fee hath a power of bestowing his Feedary in Marriage according to his pleasure, or at least of claiming the value of the Marriage, if sobethat he be under age at the day of the death of his Ancestor; but of this we have poken enough before. Now Marriage is an Equivocall word, fince it fignifies also the fee it selfe which is given in Matrymony (n). n Brac. 1.2.c. And this shall sushee of services that are 34. 6 39. noble.

21. That service which s rurall and ignoble, is by us called Socage, from the French word (Soc) which fignifieth a Plough, or Soccage, as Sockage: The cause of which Appellation was, that these kind of Tenants vere by our Predecessors bound to the serice of the Soc, or Plough, and came yearly hen the Season required, with their Oxen plough and fow fome part of their Lords and. But by processe of time it is now beome fo, that these kinds of works are in most aces changed into a certain Rent, although the

2. Inftet. com.

m Brac.ib.

(o) Lit.l, 2.c. 5. Infl. com. c. 31.

the ancient name of the service remains sell (0) So that this Tenure which at first was slightly esteemed of, is now accounted much the better; for the original labours are converted into a moderate summe of money, so ly the value of the yearly rent is exacted for Releife, and it is obliged neither to Guad or Marriage. (p)

(p) Dyer, fol. 362.11.18.

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(q) Brac. l. 2. c.35.n.1.

(r) Lit.l. 1.c.5 Infl. com. c. 31.

(s) Brac.l.2.c. 8.n.3.vet; N.B fol.49. Brac.l. 1.c.11.n.1.Bri. c.66.fo.165 b.

(t) Lit. l. 2. c. 11. Inft. com.c.

34. Bro. c. 66. n. 9. or Marriage. (p)

22. Wherefore Socage which at first a purely a Villain and Rural service, is now wided into free and Villain. Free Socage that which in lieu of villain services payes the Lord a certain annual rent. (q) Villain Socage is double, that ancient, Viz, by which there is a certain service performed.

which there is a certain fervice performed reason of the Fee, for this is even still in uk [r] And the other which is pure villaining in which there is obligation to incertain la vices, and undetermined, where one cannot tell over night what service will be required next morning, Viz. where any one byth fon of his fee or person is ingaged to do what foever is commanded him. () But our Ma derns do not subject those who hold in Villanage to fuch uncertain fervices. But calltha villainage where a villain Tenant according to the custome of a Mannour or will of the Lord, or a Free-man by reason of his fee, performs service duties to the Lord of the Fee: As to carry Dung out of a City, or ou of the Mannor of the Lord to his Lord lands, and the like. (t)

free Socage, enjoyes the best Conditions of any other arthis day, being freed from the

incum

neumbrances of Guard and Marriage, (u) (u) Smith which to Tenants by Knights service often com.l. 3. c. 5. falls out most heavy, But this at present, if taken according to the utmost latitude of its fignification, is understood to include all other kinds of Tenures, which are held by a certain Rent, free from Guard and Marri-W Brit. c. 66. age, [w] as those which are held by Franck-[x] Id. ib. almaign, [x] or in ancient Demesne of the King [y] by fee-farm, [x] in free Banck [a]

or Burgage. [b]

24. The service of Franck-almaign, if at [z] Brit. ib. least we may call that a service, which payes neither fealty nor any terrene duty to the Donor, is where a fee is given to an Abbot or Prior & their Covent, or to a Dean & Chapter, to a Mr. of an Hospital, or any Body or Person Ecclesiasticall under that capacity or notion: That they should pray for the souls of the Donor and his Family living or dead. But this at present can be done only by the Supream power; for that there is a Statute [6] which prohibits any from granting their fee-simple tobe held of himselfe. Wherefore [c] westmins. whofoever from that time [the King excepted] gave an Estate in Franck-almaign, did in vaine adde that word [Franck-almaign] because it wrought nothing, but that the Donees held the same Estate of the Superiour Lord by the same services which the Donor held it, whose act could prejudice none but himselfe. [d] But it seems the Capitall Lord [d] Bro tenures might remit these services, and so make it 61. Frank-almaign, [e] s

[y] Id. b. Lit.c. Socage. [a] Id. ib. [b] Bro.tenures n. 5. & 77.

[c] Id. ib. 71.

25. The 97.

The service of ancient Demesne is that which the Tenants of the ancient Demelno of the King performed. Now ancient De mesne is all that which was immediately held of the King St. Edward, or William the Con-[f] Term.law. querour. [f] For the later tooke an exact

Ancient Demef, furvey of the whole Kingdome, fothat he might know of what Lord every rodd of ground within it was holden: This furm yet remaining in the publique Excheque, by him filed ir inchefter Roll, or Doomida, [g] Camd. Er. [g] Now by ancient Demelne, wee under

c. 94. Coo pref. stand all those Mannors which were there to bis 3d book. affigned and afcribed to the King, namely because they were the Kings Demesse & Ancient: and the service by which these To

[h] F.N.B.fo. nants hold of the King is Socage. [b] Bu 13.D. 6 14. these had a double manner of holding, Va fome by Charter, and were called the King free Tenants : Others by Scales, which wa call Copies of Court Rolls: Or by the Verge, and these were stilled the Kings for

Sockmans. [i] Neither of thefe are Tenam [i] Brac 1.2.c. at the will of the Lord, but by fervices fit 8. n. 4. Erst. c. due, according to the Custome of the Man 66.F.N.B. fol. nor. [k] Many Writers have treated of the 14.D. Flet l. 1. liberties and priviledges which these To nants had, that they might have the greate [k] Kitch. fol. leifure to attend the Kings bufineffe. [1]

26. The service which is performed alle [1] Brit. ib. F. by Tenants in Fee-farm, is Socage, in the N.B.ib Lit 1.2. gard Fee-farm cannot be where Guard and Inft. com. c.35. Marriage are referred to the Lord by Charter. [m] And the same is to be understoodd Tenants

B. C.

€.8. 99.Brit. c. 66.

Flet .1 . 1 c. 8. [m] Brit. ib. Tenants in Franck Banck. [n]

27. Burgage is a certain Rent payable 1.4.tr. 6.c.13. by those which inhabite the ancient But- n. 2. roughs or Cities (which fpring from them) of this Kingdome, either to the King, or another Lord to whom the King hath granted it : And this also is called Socage. (0)

28. Having passed so cursorily over these, c. 10. wee are to know, that there be many more Fee-fervices behind, which are partly proper to Tenants in Knights service, partly to Socage, and some common even to both, as fetta ad curiam, fetta ad molendinum, Herriot, Aide, to make the Son a Knight, or to marry the Daughrer, Quit-Rents, and others, which for that they depend upon divers Cuflomes of feverall places, and upon the feverall will of Lords, is impossible punctually to reckon. (p)

29. Sella ad Curiam is a service which binds the Tenant to frequent the Court of his Lord: (9) But they are not Feodaries alone who are obliged to this; For wee have mention made of a four-fold fuit of Court. One by Covenant and Oligation, Viz. when another who is not the Lord of my Fee, Covenants with me or my Ancestors, though not his Feodaries, to performe this fuite of Court. Another by Custome, where any one and his Ancestors time out of mind, were wont to come to the Court of another and his Ancestors, though not Lord of their Fee. The third we may call a Servile fuit, which the Feodary performs to the Lord under the notion of service. The fourth is Royall, by which

[n] Brit.ib.Br.

(o) Littl. 1. 2.

(P) Bro. Tit. Tenures, n.50. Ø 53. Ø 58. (q) F. N. B. fol. 158.

which are found to goe twice a year to the Sheriffs Courts, or Leet Courts, that they may not be ignorant of what is done there for the peace of the Common-wealth. Now our Authors call it Royall (though by corruption some tearm it reall) because the maine reason of it is, to perform Legiance to the King, for there all above 12, yeares old (r) take the Oath before mentioned.

(x) Termes of the Law, Tit. fug.

30. Secta ad molendinum is a service by which the Feodaries, as bound by Custometo carry their Corn to be ground at the Mills

B. fal their Lord (s)

(f) F.N.B.fol.

31. Herrot, otherwise Hariot, is conpounded of the Saxon words (Here & Geat) Here fignifying an Army, and Geat a Journey;and it was a Tribute payedunto the Lord when hee went to Warre. (t) Bracton fayes that Heriot is alone with Releife: (u) And Britton, (w) That it is the Gift of the Feods ry at his Death, given to his Lord, by which he leaves unto him the best Beast he hath, or some other thing according to Assignment. And he faith, that this doth not touch the Lord, nor the Heir or Inheritance, not that it is to be likened to Releif. But that it rather springs from the love and courtese of the Tenant, coming either from a Right of necessity of Duty, and ther both from villains and Free-Tenants. Heriot is at this day a service by which the Tenant is bound to Jeave to his Lord the best Beast, or for defect of that, some other moveable which her hath at the time of his Death. And this is two-fold, namely, servile, which Tenantia

(t) Lamb.

ac xasoropia,

vero. Hertot.

(u) L.2.c. 36.

(w) C. 69. &

Flet. l.1.c. 18.

ee simple payeth, or constumary, which is (x) Bro. Tit. yed by Tenant for life according to the Heriot. n.5. ustome. (x)

of Uses and Profits.

TIT. IV.

T appears from what hath been faid, that Services are either reall or personall, (a) (a) Brac.l.4. reall we have already spoken, personall tr.1.c.39. re such as are due unto the person, (b) and (b) Id. ibid. his kind is twofold, one due from the peron of one, to the person of another, of which lowe have made mention before, the other hich is due from an estate to a person, of hich fort are profits, uses, Habitation; wherepreules and profits, in respect of the peron to whom they are due is a Right in repect of the thing which is due, a Ser- (c) Id.1.4.tr. I. C.37.n.I. fice. (c)

I. Since there are none in England beides the Soveraigne power, who hath a plepary and absolute dominion over immoveables, it is not hard to discern who they are, that are Possessors of estates, as to the profits, the estates being not wholly theirs, which we shall tearm usufructuarii; and who not, namely whether all Subjects, by what Title foever they hold, or onely some who hold (d) resembec.de by this or that Title, for those which have feed c. I. n.4. a Fee, have onely a power profitable, (d)

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(f Bra.1.4, tr. 1. C.36.N.2. ager.

(h) Brit. c.66.

(i) F.n.b.fo. 55 flet. 6 1 . C. 12

k 1,4,tr, 1,c.36 Plom, 10,83,

which according to the Feodists ceaseth. they violate the faith due to their Lord, ! not by our Law, fave in Cafe of Felony (e) Stanf. plac. now he which hath any use or profits led Coron.1.3. c. 30 hath some way or other a power also, Moreover he which hath a Fee-farm, who the Civill Law of the Romanes called a (g) vectigal phytenticus, (g) which is one that hathan state to improve, although he have apen tuity, yet he payes a yearly Rent, by w of an acknowledgement of the Stign rie. (b) Laftly, he that hath a Freehold and abuseth it, is liable to an Action Waste, (i) which should not be, were fole Lord, and had absolute power in Dr. Stu.1.1,6 23 disposing of it; but Bracton is very clear declaring what Titles our Lawyers inch under the notion of uses and profits, for Ringuishing between a Free-hold, and at state in profits; he is much more diligent distinguishing between Fee, (k) and le Farm, or farming of the profits, for the in those the possessor hath a perpetuity, inthe only an estate for life, whence it follows, he onely is an usufructuary in an Estate w us, who hath Lands or Tenements for Te of years, or at the will of another, of who hath Lands by way of pledge or fecun which we call Mortgage, or by way of by cution, whom we call (according to the versity of the cause) Tenant by Elegit, I mant by Statute Staple, or Statute Merchan or laftly, he who hath the Lands of an Ho

in Right of Guardianship, untill he com

to full age.

Now an estate of profits may be created with us , either by gift and bequeft, or by (1) Inf. com.c.5 conditional agreement, (1) and it appears that our ancestors did sever the profits of a Fee from the propriety, until it was changed by Act of Parliament, (m) but those estates which are held by Copy of Court Roll, or by the Verge, at the will of the Lord, cannot be Leased out without the confent of the Lord, Cafe. above a year, (n) nor can they be bequeathed or aliened by any agreement, without being first surrendred into the hands of the Lord, and from thence received by him to whom the former Tenant defires to alienate them.(0)

3. It is held also amongst us, that uses and profits may be of those things which are extinguished by use and daily change, so that Plow: 542: without all doubt one may bequeath or by agreement create an use of Servants, Mo- q infit:com. ney, Oxen, Cowes, Sheep, Corn, or any 6:5:

fuch like things. (p) 4. Now thele kinds of ules and profits are f Co.1.2:fo.17: dissolved, either by the death of the Ulufru- a, Plow: 419: Auary, (q) as Copyholds, or for Treason, 420: in which Case the Delinquent looseth all his t Flet, 1:1:6:14 goods, and life also, (r) or by processe of Mag:char:c:4, time, namely when the years for which they westmin, 1,0: were made are expired, by Confolidation, (s) 47: Stat, Glo: when the Ufufructuary purchaseth the pro- 1 5: refmin,2: perry, and laftly through the default of the c:35: Dver: fo: whitructuary, as for wafte, or letting his eftate 30:42:178: to another, contrary to Right and Law. (t) F:n:b:fo: 55,

Flet 1.1.c. 12.

(m) 27. H.8. c. 13. Coo. 1.1. Chudleys (n) Infitt . com

o Id c. 15. p Bro: Tu Tewures 133:

rF.n:b.2.3:201

Of Use and Habitation.

TIT. V.

(a) 27 H.8. c.10. Dr. and Stu.l. 2.c. 12.

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Usus hath as large an extent with us, a useful fructus hath with the Civilian (a), but I do not fee any cause why the same Law which the Romanes had, both for use and habitation, may not take place with use there being nothing which I have ever the which might either hinder the giving and bequeathing of them, or purchasing thempy agreements: but yet I find nothing specially or positively determined by our Lawyers from whence I may with considence avent any thing.

Of Customes and Prescriptions.

TIT. VI.

IT hath been said before, how that Title and Dominion over corporall things is through a just act, and purchase transferred by Livery: Now we are to declare how it may be transferred without by Custome, namely by a long, continuall, and peaceable and quiet possession, through usage and time,

and without Livery, (a) for Prescription (a) Brac 1.2. hath sometimes the force of Livery. (b)

1. Justinian for the most part puts a diffe- Flet.1.3.6.15. rence between Custome and Prescription, (b) Brit.c.4. as that the first should be of moveables, the Bracil:4:17, 1, later of immoveables, (c) yet they are often c:38n,13

used promiseuously. (d)

2. Moveables are not alwayes taken the verb, prescrip, lame way by Custome, for fuch as are bought d Vultains com in a publick Fair or Market, although stoln, sup, Justin: 11,6, are immediately the buyers, the fale being and 10, legall, viz, the Toll, if there be any due, payed, and a coutract entred, to that the ev,tit,barg, & Owner can no way be evicted: but a Horse fale, tit, 24. which is stoln, is thus by the Custome made Dier, ones own, viz. If it be ridden in an open fo, 77.11,66, Market or Fair, by the space of a full hour, or otherwise shall be led there, continually and openly, that he may be shown, and f2 and 3, Pbs then the Seller coming to him that keeps the and Mary c:7: Toll book, shewing the Horse, and telling his own Christen name, and surname, as also his poseffion and place of dwelling, proving all this by one witnesse, who is well known unto him that keeps the Toll, he is to enter it into the Book. (g)

3. Any Beaft or Cattell found straying in the fee of another is by the Custome, after publick Proclamation made in the neighbouring markets; due to the Lord of the Fee, unlesse the owner challenge it within a year and a day, (h) to also are such things which are left and forfaken, which we call h Brit, Dr, Stu, Waifes, (i) asalfo fuch as are brought to Land 12,0,3,0 51:

from Shipwracks, if they fall not under i Id.ib:

g 31 Blizoc. 12

H 3

(1) New book of Entries, verb. Pro. Brac. 1.2.0.5 M.Z. Byit. 6.17. (m) Dyer f.121

n.16.

the notion of wrecks, k) but all other things whether given or found, or happening through their over heavinetic do not follow the fame rule, much leffe things which are Roln; [1] yet the Citizens of London are faid to have a Priviledge, that whatfoever any one buyes appertaining to his own Trade, and brought bona fide to his thop to be bought, it becomes immediately his own without all fear of eviction. (m)

4. Prescription is a legal definition, orle mir of time ordained for this end, that in all reanfactions for peace fake there my be an opportunity observed, all Prescription onstending to this, that nothing may be done in the Common wealth later or fooner, then feems just and equall. Moreover in the mannaging of affairs, it is fitting that we should have limits of time prefixed, both to quicken industry, and avoid precipitation. [n]

(n) Prateus ubi supra.

f. But Prescription differs from Custom, that onely coming from pollession, addings new Right, and adjoyning a new Title to the thing acquired, having substracted theo ther, whereas Custome doth nothing fo, for that it onely imparts its own Lawes to thole Jur. Civil. 19. by whom it rook its Originall, and by whole mage and confent it receives perfection.[0]

6. Prescription although in the common acceptation it be fuch a portion of time, as exceeds the memory of man; [p] yet hath it much of diver firy among it us; but for orders falle we have thoughtfit to divide it thus, viz. into that which works to the fecure avoiding

o Conna. l.I. Commen. n.8. p Dr.Stu.l.T.

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equiring of a propriety. 7. For the avoiding of dammage, this is 1 3 H.7.c.1. heif, where any fum of money is adjudged 2 and 3 Ph. & the King by any Statute for an offence, there the offenders may after two years clapled, prescribe to themselves immunity, but in Case where it is due to the King, and ano- 6.11.31.6.4. ther as Informer, then against the suit of the (s)23 Eliz.c.1 King, after two years, and against the In- (t) 8 R.2, c. 4. formation of the common person after one 5 Ed. 6.c.14. year, [q] unlesse such penall Statute doth (u'8 H.6.c.9. particularly prefixe a certain time, and I H.8.c.4. in this Case there is great difference 39 Eliz. c:t in Statutes, some allowing one year, [r] w 7 H:8:c:3: some one year and a day, [s] some two x 23: Eligica years, [1] some three, [u] some four, [w] y 23 H:6,5,15 some a moneth, [x] some two moneths, y some I E: 6:c:1. fix dayes, [2] and some fifteen: [a] besides, 2 5 Eliz:6:5, according to the common Law, if a man up- and 15:

against any appeal either of the Wise or b F, w b. so:25?

next of Kinne of the party slain. (f)

3. Things immoveable, whether corpo-fo:66, b:
rall or incorporall have divers Prescriptions, c new bo:Ent:
The most usuall is that which is called the Act in Chaplein longest, and is extended beyond the memory d Eod:tit in reof man, for whosever will prescribe, a-parations.

on an indictment of murder be acquitted, he a 11 H,7:0,7, may after a year and a day plead Prescription 7 H,8:0:7:

gainst another the maintaining of a Chap- e Eod:tit: Qualain, to celebrate Divine Service in any re im edit in Church, (c) or the repairing of a Church, Hospitall.

Church, (c) or the repairing of a Church, Hospitall.
(d) or that being present at the Election of f End. tit. An-

the Master of an Hospitall (e) or an Annui-nuity in corp:
ty, (f) or the Cognisance of any Plea in his politique.

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T Brac:ib.

g cod. ferm. de Court, (g)or any service in his fee, (b) he met prove them to have been time out of mind breif. h eod. Replew in or he doth nothing, nor do we mean anyo ther then this, when we speak generally of amerciament. Prefeription.(i)

F.n,b.fo, 122: 9. But there are Prescriptions of shorter i Dr. & Stu: rime as of 40 years in the way of Tithing. 1,1,0:8. five years for Lands and Tenements in at k 2, 3:E.6.

of a Fine acknowledged lawfully(1) of three c. 13. years, in Cale of Lands and Tenement 1 Dr.Stu.l. I held, gotten by forcbile Entry, and helds c.25,1.2,0:14, Lit.1.3:6,7: Int long in quiet possession, (m) of a year and com:c:27:Plow day for a villain, to affent his liberty against 357, Dier fo: his Lord, if he have continued fo long if

ancient Demesne, or in any of the Kings Ci 72:n:3: m 8:H:6:c:9: ties, or Towns, without being claimed a molested, (n) as also for the Confirmation of n Flet:1,2,0,51 any Deed made by one who is in Prilon, un-F,n,b, fo: 77:

o Littl: 3:0:7: leffe he who made it do in the interim te Bracil, 4, tr, I,C, voke it, () fo alfo for the hindering the En try of him who having omitted continual 2.12,7, Brit, 1,42 claim in case of his being uniuftly diffeiled d Plows: 357,

and 372: new those Lands and Tenements if he shall en-Terms ver:non: devor to recover them fo coming by the right of Succession, to the Heir of the Diffeifor.(1) claim:

p Brit: 6:34 10. No prescription of time shal prejudice the Perk: grants, 29 Supream Power; (q) nor any Lord, but that he q Id,c,34, Bra: may challenge the perquifite of hisvillain.(1)

11. Nor is there a Prescription in all things; as for example, not in those which \$ Lit:1,2,0, 11, are not subicet to commerce nor in those of which the Crown is properly fole Lord(s) nor

t Id, ib: Brac, tr, where the use is repugnant to reason and uBrac,1:2,6 19 good manners,(t) nor in case where an alienan4,1,c:38,,n13 tion cannot be made without an instrument,

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and it is agreed amongst some of what things a prescription cannot be, and received generall with us that no prescription in Lands [w] Dr. Stu.l.

maketh a right. (w) 12. Nor can a prescription be of those [x7Dier.fo.70. pertinencies whose principles have not a n.40. perpetuall and durable continuance, (x) or of those things whereof no one can tell what he or his Ancestors particularly, whose Estare he hath, did possess.(y) And lastly a Prescrip-

tion is of no validity against a Statute after-

wards made. (3)

13. It was much controverted among the Ancients, how long after one might bring his Writof Right, after the title or Right to Landsor Tenements, &c. have laine dormant, or his Affife or Writ of entry to gain a possession as it were lost by him to whom it appertained, (a) but this whole Controversy is composed by the prudence of Parliament, which hath provided and fitted apt remedies for the difference in each case. [b]

I.c.8.

[y] Id.fo.71. n.42-[27 Id.fo.373.

n.13.

[a] Thaleat. Digeft.br.l.10. C.21.

[b] 32.H.8.c. 2.Coo.l.4.Bevils Cale fo. ID.A.

of Gifts.

TIT. VII.

Here are many waies of Acquisition by the civill Law, viz. By way of Gift, fuccession, Testament, and others as shall appear hereafter, (a) but in regard, that amongst all the other causes, the most great, known

[a]Bract.l.3. c.4. Flet . 1 3.c.

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knownand famous is that of Donation or gift. therefore it dorh worthily challenge the first place, for that by it, there is a more great and frequent acquifition then any other, (b)

[b] Brac.cod.c. 5 . n.2 . Brit.c. 34.

1. Donation is a certain institution which proceeding out of meer Courtefie and will without any coercive or compulfive Law or Right transfers a thing unto another. And (to give) is to render a thing his that receive it effectually, otherwise that Donation or Giving were useleste, which could be revoked

[c] Bract. eod. n.z. Brit. ib. Flet.1.3.

and made void. (c) 2. Our Authors do frequently call a Dod Bratt. 1.2.6. nation a Feofinent, but the word Donation hath a greater latitude; for that it doth not only comprehend a free alienation of immoveables, but of some moveables also, (d) yet in Lands, these appellations are distinguished thus. A Feoffment is of a Fee simple to

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e Lit. 1. t.6. the Donce or Feoffee, and a Donation or Gift is of an Estate taile. (e)

Flet.1.2.c.57.

3. Donation in the largest signification, f Brac.1.2,c.5. is thus divided, viz. That it is either amongst those who are still living, or upon occasion of Death. Of which we thall speak hereafter. (f) Of gifts some are simple and pure; as namely, those which proceed, no Law or right, either civill or naturall inforcing, no Reward, Fear, or Force intervencing, from the meer free bounty of the Donor, and where the Donor will not inany case that the thing given should revert to him; (g) another is from a future Caule, namely where any cause is interposed for which a thing shall or shall not be, (b) under

g Brac.1.2.c.5. n.3. and 1.2.c. 10. Flet .1.3.c. 3. and c.8

h Dierfo.33. 2.34.

which kinde, fall gifts by reason of Marririage, Dower, (i) or Death, &c. As if one i Glan.1.7.c. 1 gives any thing with such an intention that and c.18. it shall be the Donces when a subsequent Brack.1.2.c.7, thing is performed. And these kinde of Gifts Flet.1.3.c.9. are not properly Donations when they are & Brast.ib. Bri. conditionall, (4) but Donation is sometimes c.34.F.N.B.f. with relation to a cause past, (1) and some- 205 .b. Flet .f. time, with relation both to past and future 3.c.11. causes,(m) and some Donations are free and 1 Brit.c.35 Sit. pure, some under conditions and suspended, c.5. fo.76 (a) fon eabsolute and large, some first and m Plowden fo. limited to certain Heires, and some exclu- 455 ding Succession. (e) So also tome Donations nBratt.1.2.c.9.

are by writing, some without. (p)

4. Wherefore we are to fee who can give F.N.B.fo.205. and who not, and it is generally to be un- d. Plow.fo.30. derstood, that every one, who by Law and and 32. Right are not prohibited, may give, (r) now o Bract 1.2.c. all shole are prohibited, who have not a ge- 7. Brit. c.35. nerall and free administration of what they Doft. Siu.l.1. bave, as Wards who are under tuition and c.24.1.2.c.6. pupillage, not being able to govern them- Lit.1.1.2.23. selves, yet they may receive and render their Flet.1.3.6.3. condition better, but they cannot give either p Dr. Stu.l. I.c. with or without the authority of their Guar- 16. Bract. 1.2.c. dians: So neither one that is deafe and whol- 16. Brit.c.39. ly deprived of his hearing, but it is otherwise Fiet.1.3.c.9. if he can bear, though with much difficulty, I Bratt.eod.n. the same is also to be understood of one that is 4. Flet .1.3.6.3. dumb and cannot speak, Yet (according to the opinion of fome) they may confent by fignes & gods, but it is generally held that he who is dumb can not make a gift, because he cannot consent to it; so neither can a mad man work that

n.3. Brit.c. 35.

that is not Compos mentis, unlesse he injoyant (s) Id. eod. Brit. Lucida intervalla, (s) but the Church executes

in the stead of a Ward. (t) 6.34.

Paract .cod. 5: He cannot make a gift who is a Cap Brit.c.5 4.Flet. tive folong as he is in the custody and under the power of his Enemies, because he canno 1.3.6.3. [u] Bract.1.2. polless who is pollest by others; nor makes c.8 n.4.Dr.St.

Gift effectually, seeing he possetterh nothing, 1.2.0.43. (w) the same also for the very same reason, (WT Bratt.1.2. may be faid of a Servant; for that he posses feth nothing fo long as himfelf is in the polc.16.

lession of others, (w) yet it seemes he my give any fuch thing, whereof his Lord hath not as yet taken possession or Seife.

6. Formerly a Leaper could not make: Gift, as being put out of the fociety of men, (y) nor hath a Bastard any Heirs to whomh may give effectually under that notion, unless it be those who are lawfully begotten of his own Body. (3)

7. He that is attainted of Treason, or convicted of any other capitall offence, cannot make a gift after the Felony committed; # to be he be afterwards judicially convict and condemned by sentence, (a) yet in some cales he may before conviction make a gift of

Chattells. (b)

8. Nor can any one give who hath not Seifin of the thing given : except the King only, (e) which according to the ancients true also, notwithstanding that he have Dominion and receives Services.(d)

9. Nor are gifts made between manand wife worth any thing, for a man cannot give

(x) Lit.c. Vill. (y) Bratt.1.2. 6.5 . Brit. c.34. (z) Bract.and Brit.ib.Perk.

(a) Bratt.1.2.c. 13.Brit.c.34 Stanf.Pla.co.l. 3.c.32.Flet.1. 3.6,7.and 1.3.

tit. Grant. 48.

c.10.Fulbeck. Seigniories f. 26. Perkins

Grants 29. (b) Vid. next

Chapter. c Dyer fo. 108.

7.28.29.30. d Eraft.c.5.

Spec. Fuft.1.2. e.de contractes

Flet.1.5.0.15.

E

Lawes of England.

to his wife, nor e converso, during coverture: Because such gifts between such persons are prohibited. But if they be made before marriage, or after Divorce, they are valid, provided they be not upon the score of subsequent marriage; yet a man may by his last Will and Testament, give a Fee simple to his wife, and the reason of the difference is; because a will is not of force before the death of the Testaror, (e) and then the Husband e Lit.1.2.6.10. and wife cease to be one and the same person. lib. Assis, pla.60

12. Nor can any man effectually give that which is anothers; (g)nor can one who is beyond Sea according to some, (b) make a gift, but others maintain the contrary, which is the better opinion, (i) The wife cannot make a gift without the Husband, nor can the Husband without the wife of such

lands as are the Wives. (4)

11. Moreover the Statutes of this Common-Wealthhave fet fuch bounds to Donations and Gifts that they permit not any man to make gifts to the defrauding of his credi-

tors, beyond his limits. (1)

12. There are also some who cannot make & 27 Eliz.c.4 Gifts without the consent of others, as Arch-Bishopps Bishops, Abbots, and Priors, Cannot give Lands without the consent of the King, or some other of their Lords. Because the conlent of all them whom the thing may any way concern is needlary and requifice, n.7. Brit.d.c. (m) whence it is that they who hold of the King cannot make a gift of their Lands, with 194. 2195. out his consent, (n) nor can the Parsons of Churches

f Bro.devise 34

g Bract. l.z.c. 24. Plow.fol. C28. h Glan.l. 7.c. 1

i Braft.c.s.n.8

k Brit. c. 34. F. n.b.f.163. A. B.C.D.

113 Eliz.c.5.

m Bract.d.c.s. 34.F.n.b.fol. n Flet.1.3.6.3

[0] Bract.1.2.c. 11.Flet.1.3.c.4 [p] Bract. 1.2. 6.5.2.6.& c. II Brit.d. c.34. [9] Mag.Ch.c. 36, Fl.1.3.c.5. [1] 7 E.1. C.2. & 34 E.1.C.4. 18.E.3.Sta 3. c. 3 . [S] 15.R.2.c.5. F.N.B.fo.221. [t] 15.1.2.6. 5.11.6. [w] Bracib. x Braft.1.5. Ir. 6.c.48. 29. y Perk grants. 52.Plow.345. z Perk.ib.n. 54. Dier fo. 274. 2.43. (a) Coo. 1.1. Arabors Cafe, f. 66. (b) Dyer, fol. 151, 4. 1.

Churches because they hold nothing but it right of the Church, Wherefore they cas not make a Gift, alienation, or change, with out the confent of the Bishop and Pation unlesse it be so that the condition of the Church he bettered thereby: Yet their want net fome who afterm them uncapable of doing that without the aforefald confer. (0)

13. All are capable of receiving Donatons, unless prohibited by any express Lar or custome, nor only fingle persons but ere many together, (p) now these are Fems Coverts incapable to receive the Gifta their Husbands or otherwise, during coverture, (9) Religious persons, (r) all Feekis flicks in the name and right of their Churd, [u] Bract.1.2.c. (s) Bodies politick, (1) for thole Immoveable which are without lawfull permission gire to bodies politick, are forfeited sometimen the King, and fomtimes to the next cheif Lot 5, c.25 Flet . (u) fo neither can Jewes (w) nor any whom not under the Allegiance of the Supremed Dier fo. 224.1. (x) but in regard the thing taken, is allow ceived, the acquifition is not to themselve, but to the King as we have faid, nor finally can persons uncertain, as the Heirs of oft that is living. (y) Or the first-born of any one who at the time of the gift hath norChi dren, (x) but a possession to A, the remainer to his Heirs, though uncertain is good, [1] he also who is wholy unfit and unable tets ecure an office in any of the Courts of lufter is uncapable of receiving the faid Office. [67

14. Now all things what foever may be given , fave those things which can no way (c) Brac. 1 2.c. be possessed, those are things facred and 5.n.8.13, 14. Religious, or as it were, Sacred; and those Brit.d c. 34. are a Free-man, and that which appertains Fiet.1.3.6.6. to the Kings Treasury, which make the very (a) Flet. ib. Crowne, and belong to the Publique profit. (c) Kitch. fol. (c) To which also some adde the Walls and 30. b. Gates of Cities: (d) But at this day there fearce feems to be any liberty appertaining to the Crowne or Pierogative in the Supremacy, which may not by Charter be granted (f) Perk.ib. 85, to a Subject. (e)

15. I cannot give the Right which I have (g) Sup. rod. in a thing which is in the possession of ano- (h) Dyer, fol. ther to a third person: Yet I may remit it, or 30. n. 208. [as we fay] release it to the Possessor by my (i) Bro. chose writing: (f) Nor can any one give an action in Action, 4. which he hath to any thing, as we have faid (k) Perkab. 85, before (g) except the King, (h) or to the K. 86. (i) yet one may give it to the party obliged. (1) Dier, fol. (k) A man cannot give the reversion of an 259. n. 18. Office Eo Nomine, nor can any but the King (m) Brac.l.2. give, under the name of the Office. (1)

16. Now that a Donation may be valid, d.c.34. there are other things required : It ought to (n) Perk. ib. be free and not compulfatory, nor extorted 81, 86. Plow. by force or feare. (m) There ought allo to fol. 8,7.12,13. be certainty in a Gift, for that there can be (0) arac. ib. n. no Donation of a thing uncertain, unleffe it 12. may by some meanes be reduced to Certain- (p) Id.ib Dier, ty. (n) There ought also certain words to fo.71.n.10,11 intervene to a congruous Gift, (1) as to 2 (q) Brac. ib.n. Bargain, (p) and that there be a joynt con- 12.Dr. Stu.l.2. lent as well of the Donce as of the Doner, (q) 6.33.

5.n.8.13.Brit.

And

And that there may be no Error in the thing (r) Brac.1.2,c. given, (r) nor fraud, (s) nor prejudice to 5.n.12. Flet.l. third person. (t) Yet a false or pretended cause adjoyned to a Gift, doth not vitiate or 3.0.7. (s) Id. ib. injure it. (u) 17. And here also there ariseth a diffe-(t) 13. Eliz. rence amongst Donations, for that some may 6. 9. (u) Flet. 1. 3. be by word, fome not without Writing of Deed [as we commonly speak] (w) all Chatc. 6. w Brac. 1.2.c. tells for the most part, either reall or perlo nall may be given by word, (x) unfelle they 5. 7. 3. x Per. grants, be given by a Body politick, whose Seales necellary in every Alienation. (y) If any one y Id. ood.64. in Knights tervice be Guardian of Body and Lands, he may grant the Custody of the Lands or the profits by word only, which some affirme also as to the body or persond the Heir, (7) though it be denyed by others Z Id. ib. 65. for this reason; That the transferring of the Body doth not confift properly in the delive a Id. ib. ring possession. (a) No man can grant Lands which one hath in possession, to another, ether for life or for ever, without a Writing b Id.eod. 61. but for yeares he may. (b) Corn which is but growing may be granted by a Nude pareland that by Tenant in Tail, although he dyebe fore the Donee hath severed it from the land c Id. cod. 57. (c) which notwithstanding is otherwise in fruits of Trees growing upon the Land, (4) d Id. cod. 59. And the reason of the differenceit may be,is because Corn cannot grow without the indufley of man, but trees by nature; but Tenant in Fee-simple may give even such Trees by his e Id. eed. 58. word only,[e] because he hath a larger power

then Tenant in Taile. And laftly, Land

and

and Tenements may be given amongst those who are living by word only: (f) But in (f) 1d. cod. tase of Death, not without a Will in wri- 62.

ing. (g) (g) Seetit. of 18. Incorporali Rights are hardly given wills, &c.

without Deeds (as wee call them) luch as yearly Rents, (b) Common of Pasture, an (h) Dier, fol. Advowson, willain in grosse, or the reversion 139.n.57. Dr. of Lands after the death of the present Stu. 2.c. 16. Possess: (i) Of which nature also are Tithes fol. 80. iccording to the opinion of some, [k] but a (i) Perk. gr. 61. Rectory with it's Tithes may: [l] to which Plow. fol. 130. may be added the Right of Guard and Mar- (k) Perk. ib. 62. isge. [m]

realfa Gift be in all things compleat, it (1) Bro leafe, ought to be confirmed by Livery, or some fol. 15.20. hing parallel. [x] Now how Livery and (m) Dier, fol. Seifin is to be, we have spoken else-where. 370.257.

20. There are three kinds or species of (n) Brac. 1. 2. Donations in case of Death: One which is c. 5.n. 12.17, made meetly upon the thoughts of Death, 18. Inst. com. c. when there is no seare or danger of Death 21. Lit. 1.1. c. 7. nigh. Another, when the party being mo- Flet. 1.3. c. 2. 6 wed with the imminent seare of present 9. Dier, f. 49. & Death, so gives, that the Gift immediately fol. 91. Decomes the Donees. The third, when one being pricks with the danger, gives out so, that the gift is forth-with the Donees, but aster his deceale. (o)

(o) Brac. l. 2. c. 26. Fles. l. 2. c. 57.

What persons may alienate, and what not.

TIT, VIII.

This Chapter is so near the other, that it must necessarily repeate many this which we mentioned there. But the world lienating being more generall then giving those things which we shall set downers.

have a more univerfall ufe.

It happens fometimes that he that is Or ner of an Estate cannot alienate it. It King cannot alienate the ancient Manne annext to the Crown , but every Kingist liged to revoke the alienations of the Com Nor will an Obligation to warranty him unleffe it were upon Exchange; Orothe wife for the value in Fee, or fervice; Ou leaft, unleffe they were granted for the Co modity and Honour of the King, as the now almost wholly worne out, either by munificency of our Kings, or by the much negligency of our Common-wealth And therefore King James did worthily dy a wholfome remedy for fo peraicious milcheife.

heritance or Joynture of his Wife, butter

[a] Flet. 1, 1.

[b] Glan. 1. 6.

is may be recovered by her or her Heirs after his Decease. [6]

2. Those who hold of the King in Capite, c 3. Brit. c. 34. either by Knights Service or Socage, cannot F. N. B. fol. without punishment alienate their Lands 193.d. without license : | C | Yet some are of apinion [c] Id. fo. 175. that such alienation is good for the Buyer or A Bro. alienat.
Feaster against the Soller or Feossor, al- contenues, 69. though the King cannot be prejudiced by it. 32 H.S.c.1.

3: An Infant, [e] Mad-man, [f] Monk, mems, 34. [e or Feme-covert , | b | cannot alienate : [c] F.N.B. fo. Hor can a villain, thole things which himself 1 92. g. Perk. 3. hath purchased, i if his Lord be possessed of Grants. 15. 9. them : Or if they be not pollefied, in cale hee [f] F.N.B. fo.

be the Kings villain. [k]

4. There is also an old Law lately revived [g] Perk. ib. 3. by an Act of K. James, which to the subverfion of the Church was almost lost through negled, wherein Arch-Bithops and Bishops are prohibited to alienate the Fees of their

Churches. [1] 5. Lastly, those who otherwise may alie- c. 12. nate, in some cases cannot, namely Lands or Tenements to a Body politick, whether. Ecclefiasticall or Seculer, [m] without obtaining the Kings license for alienating is in Mortmaine. And on the other fide, Religious Colledges which were founded by the lings of England, are prohibited to alienate fol. 121. 2. their Lands without the Kings License and permission. #

6. And on the contrary it fometimes happens, that he who is not Owner may alienate ; for a Creditor by contract may alienate,

292.C.

[h] Id.ib.c.11. Bro. Exec. 175. [i] F. N. B. 202.1.

[k] Littl. l. 2.

[h I fac. fef. [m]7.E.1.18:

E.3.c.3.17. R. 24.5 F. N. B.

[n] west minst.

nate a pawne, or mortgage, although the thing be not his: As if it be agreed in the beginning, that it shall be lawfull for the Creditor to sell the Pawne if the moneybe not paid. So also may a Wife, Apprentice, or any other Servant which a Merchant appoints to sell Commodities in his Office of

(o) F.N.B.fol. points to fell Commodities in his Office of 120.H.Bro.tit. Shop, [o] or any other person who hath Contract, 37. command from the Owner, [o]

40. (p) New booke of Entries, trefpass in Agist.

1.& Ejectm. firm. 10. (q) Plow.553.

7. And sometimes it falls out, that he who hath a full power to alienate a thing, cannot doe it but after a certain forme or manner: for the King can neither purchase nor alienate without that special method of Entring, which we call Record, [a]

By what person wee may make acquisition or gaine to our selves.

(a) Brac.l.I.c. 9.n.3.l.2c.II. n.12 & c.18.n. 6.& l.3.tr.I.c.

TIT, IX.

2.n.12. Brit c. Ow we are to know by what persons wee 35. 38. Lit. I may purchase or gaine to our selves: 1.2.c. 11. Dr. And know that we may legally by our selves, Stu.1.1.c.8. our Wives, our Servants, Male or Female, 1.2.c.18. by Sons or Daughters which are under our (b) Flet.1. 3.c. protection, by Free-men who serve us, pro13.& c. 15. & vided their Deed be necessary, and warran1. 4.c.11.& c. table and approved. [a] And also by these Servants [b] who are not under our power,

as well as by those who are, provided they be not under anothers, yet fo, as we take no benefit by them before it be determined whose they are: fo also by a Common Servant, and that as well by anothers as ones owne. which we do bona fide potiefle, and by fuch a one of whom we have an ufe.

1. And this may be done also by Procurators, Tutors, Keepers, or Guardians, who either bargain in our name, or are in possession: And the same is to be understood of those who are naturally deafe and dumb. | d |

a. The Sons and Daughters also of Villains, which are under the power of their Lord without manumission. If they make a purchase without the bounds of the villainage, have no Heir but their Lord. that he take possession of such Tenements, either in the life of his Villain after his (e) Brac 1.4.17. Death. (e)

(c) Brac.1.2.c. 18.n.6.Flet. l. 3.c.4.& c. 15.

(d) Id. ib.

3.6.13.n.1.

Of ordaining last Wills Testaments.

TIT. X.

He third kind of Donations which are by reason of Death, are last Wills and (a) Brac.l.z.c. Testaments. [a] Now a Testament is the de- 26. Flet. 1.2.c. termination of our Will, concerning that 57. which one would have done after his de- (b) 1. 1. de m. cease. [b] And it is double, Viz. Proper, or Testament.

ion

Improper. That which is properly fo called is that laft Decree of a man, in which her names his Executor. [1] And hee is in the c Bre. Teff. 20. place of him whom the Romans called Herei. & is as the Basis of the Testament, [4] topre d Swin. par. fo. fenting the flate of the Testator: That which 1. Selt. 3.n. 19. is improperly called a Testament, is any o e Valteins, in ther last wil, whether a Codicel or Donation com. sup.Inflit. by occasion of Drath or Letter. [e] And es tit. de Teftam. ther of these may be two-fold, Viz. either ord.in pri. n.

9,15,11. Perk. Teftam.

476. g 32.H.8.t.1. Coo. 1. 3. Bakers cafe,fo. 31.Dier,fol.53, u.13. & fol. 72.n. 2. & fol. 143. B.

54,55. mentis.

16. n.2. Glan. \$2.71.13.

fol: 36: 1 Swind: part cumftances to supply. [m]

4: fett:25: 7:7:4:

written or Nuncupative : [f] but Lands cannot be given by a Nuncupative will. [e] That rigorous way of Solemhity which the Remans used in making of Wills is long fince abrogated by the Canon Law, which counts two Witnesies before the Parish Priest su ficient to maintain or prove a Will, [b" Not doth the Custome of England oblige to much as the Decretall; for with us it is sufficient to pronounce a will before two h c. cum effes, Free-men, whether Clergy or Lay : [1] mentis. Yet our Sages doe, for very good reason, mentis.

i Brac. I. 1. c. gent in the making of Wills. [4]

. Nay so irksome doth that Curiofity of 1.7.c.6.Dier, fo. the Ancients feem unto us, that we esteem every probation of a Will equall, which is k Coo.l: 3:cafe consonant with that original simplicity of Butler & Bak: Ju, Gentum. [1] Nor are there two Witnelles necessarily required, if there be other cir-

In the admitting or rejecting Wirnelm Brit: 28: fo: fes, we doe not much differ from the Civill Law. For as the Heir there, fo the Executor With us cannot be a Witnesse, yet a woman is

not admitted. [a] Nor is it to effentially ne- n Swin.part 4 ceffary that Witnesses should be interrogated Seff. 21. in their giving testimony, unleste they be fuch as are capable of being removed by other exceptions, [o]

4. Although Wills take their force from Sect. 10. the Will of the Toftator chiefly : [p] Yet an p Perk. 555. Executor cannot have his Action against the Plo.412,413. Debtors of the Testator before hee hath en- q Perk. 482, tred the Will, and procured an Authority 484, 486, Bro. for it from an Ecelefiafticall Judg. [7] And Execut. 49,19, although some will not grant this to be of an- 139. cient custome, [7] yet the contrary is most r Bro. Testam. evident, s

5. But when an Executor comes to a Judg f Glan.1,7,6,7 to publish a Will, he shall upon Oath affert, Brac. 1,2,6,26. That hee doth beleive that Testament which n,2. Plo. 280. he exhibites to be the true and last Will of Flet.1, 2, 6,57. the Party deceased, and that at a time limited by the Judge [unleffe hee be then prepared thee will make and render a true and faithfull Inventory of all and fingular the Goods which the Teftator had at his Death : And that he will pay Debts and Legacies, and render a just accompt of the execution of his Executor-ship, when soever hee shall by the Judge be required thereunto : [t] t Lym. prov. and this finished, he becomes the same person de testat. c. stat. with the Testator. ful Nor doth he only bone memor. challenge all things which were the Tefta- u 9. E.3. c.3. tors, but renders himselfe also lyable to his Debts according to the value of the Estate received. m

6. If there be many Executors named, 35. Dier, fol. they may all if they please undertake the 187.n.6. Office ;

o Id. part, I.

in fine.

Institutes of the

x Perk. 486.

Office; but if one onely be willing, he may doe it. [x]

y 13.E.t. St. 2.c.17.21.H. 8.c.3 . Brac. 1.2. 6.36.n.2.Glan 1.7.6.6. Dyer, f. 232. n. 5. & N.B.fol. 120. D. Z 31. E. 3. C.

II.

7. But if any one dyeth , having mades Will, and yet not named any Executor, a otherwile altogether intestate, the proper care belongs to the Eccle fiafticall Judge; for that he is liable to all the Debts of the party deceased, as farre as the value of the Goods will extend, [y] and is obliged to commit the Administration of the Goods to the Widow, or next of Kinne, or at least to fuch 1 Party as will undertake it, and put in good security both to Administer faithfully, and to preserve the Ordinary harmeleste. [1] 171. n. 26. F. And here alle hee is to make Oath | as farte as he knowes or beleives | that the Party deceased dyed, exhibiting a Will, in which there is not any Executor named, or whole Executor named refuseth to undertake the Office : Or [if the case require it | that he dyed wholly inteffare; And further, that he will make and exhibite a just and fatihful Inventory: That hee will according to the value of the Goods he shall receive, pay the Debts of the party dead : And the portions also if there shall be any over-plus affigned by the Judg to the Children of the Party deceased [if he have any left or to the refidue of his Kindred. And laftly, that he will render a just account of his Office when the Judge shall require it : which being finished, he obligeth himselfe with good security to a due Administration of the Goods , and is at length made Administrator, a when hee receives letters of Administration under the

2 Dyer, fo. 294. n.7.8 10.339. n.46.

Authenti ch

Authentick Seale of the Ordinary.

8. But here it is questioned what is to be done in case no one will be Executor or Administrator ? And in this case the Judg ought to lequefter the Goods of the deceased ; and calling the Creditors together by his command, give them fatisfaction as the Law prefcribes. b]

9. But who is competent Judge in this Bro. Teftu. 20. cale ? truly the Bishop of the Diocesse where & Execut. 90. the Party dyed is Regularly. Yet there are o- & 117. Fle.1.2. thers, as well Lay, as Clergy-men, who have c.62. Dyer, fol. the prescription of this priviledge or liberty 232.8.9.8 fol. [aswe call it] or elfe a grant of it be by an- 256.n.8.& folo cient Charter, [c] I say regularly, because 160.n.42.Ple. it is true, in case the Party deceased have not fol. 277. an Estate, or Goods in Sundry Diocestes; [d] [c] Perk. 486: for if so, then the probation and publication Dr. Stu.l. 2.c. belongs to the Arch-Bishop of Canterbury or 28. Swin. de Torke | it it be in the Province of Yorke | by teft. part 6. Sec. Prerogative. [e]

10. When we affirm the Bishop of the Di- d Swin, ib. ocesse competent Judge, we intend the same e Lym. provins alfo of his Officialls, whether he be Vicar ge- Statut.de tefta. nerall, or Commissary, [f] or Arch-Dea- Perk. 489.

claimsthis power. (g)

[b] Perk. 483.

g Id. ib. 25. Perk. 492,493

503.

Of the Military Testament.

TIT. XI.

tlr Law doth not permit any priviledge to that Testamentum Militare, which to a Swin.part 1. Pagan Law denyeth to last Wills: (a) Fer Sell 19, & part that all those Roman subtilties are disloved 4. Seft 17, 18, into the ancient Law of Nations.

Who they are that may make a Will.

TIT. XII.

COme there are who by our Law are ab-Ofolurely prohibited to make a Will, and some who are prohibited as to certain things only,

1. An Infant is absolutely forbidden, but in this case Infant is taken doubly, viz. A male under fourteen, and a female under a Swin.part 2. twelve years of age. Otherwise under twen-Sect. 2. Perk, ty one for both fexes; those of the former rank cannot make a will at all, (a) thefe of b 34.H.8.c.5. the later may of Chattells but not of Lands Dr.& Stu. 1,1. in Fee, (b) unless any particuler custome of c. 12.

a particuler place permits it. [c] c Perk . 504. 2. An

1. An Idiot, [a] viz, Such a one who (d) 34.H.S.c. cannot give a reasonable answer to any or- 5. dinary and easie question, [e] also a Servant (e) Swin patt. for the same reason by which he is forbid 2. Sett.4. to give, whilst living, [f] can dispose of (f) Sup. state nothing by his last will, whose possession is Donation S.5. feiled on by his Lord, [e] or claimed by word (g) Perk.29. only (1) unless in case that he be Executor to Dr. and Stu.l. another, in which cafe, he may confittute a- 2.c.43. nother his Eexcutor, even against the will (h) Bre. Villein of his Lord, for that the goods which are con- 50 tingent to this Office, are not his to his own (i) Idib.68. ule but to anothers, [7] so also a Captive, be- 73. cause himself posicifeth nothing, but is in the (kBrac.1,2,6, polletion of another, [4] which is true like- 16.n.5. wife in those whom we called Out-lawed. (1) Id.1.3. tr.

3. Moreover, he that is guilty of Treason, c.13. Dr. and hath not a power to make a will: Because Stu.l. 1.c.6. if he be afterwards convict of that Crime, he and l.2.c.9; forfeits what ever he possessed at the time of (m) 5.E.6.c, the Treason committed, to the King and II. Swn.par.2; the Exchequer, [m] nor he that is guilty of Sect. 12.

Felony: but here we must distinguish, for if I.R.3.c.3.

fuch a one dye before conviction, he may by his Will bequeath both his Lands and Chartells, or if he be obstinate before the Tribunall, and resuse to put himself upon the Triall of God and his Country, according to the Custome of the Common-wealth, or shall stand mute, for in this case if he dy intestate he reserve his Lands intire to his next Heir or if testate he may dispose of them to whom he please, and forfeits his Chattells only: Moreover, if he be Convict he looseth his Lands from the time of the sact committed;

(n) Swin, par. 2.5.17.Bro. Forfeitures 5 . 28.65.89. 103.113. 117. [0] Braft .1.3. Br. 2.6.31. [p] Stan.pl.cor. 1.1.6.3. q See tut . Mur. T 2.H.5.C.7. S 1.E.6.c.12. 113.Eliz.c.8. u Swin.par.2. S.16. W34.H.8.c.5. x Swin.par, 2. 5.9. Bract.1.2. c.26,n:1.Cov. Ognets cafe. 5'1 y Bro. Tefta.9. 11.13. and. Execut. 132. 175.178. Glan.1.7.6.5. Perk 502.

committed; but his Chartells only from the time of his Conviction, so that before Conviction he may give them or alienate them a pleasure, (n)

4: He that murders himself, is by us teamed Felo de se, and hath no other Successor, as to his Chattells, but the Exchequer, (s) yet it is much doubted at this day whether he for seits his Lands or not, (p) but that his Chattells come into the Exchequer is out of question, (q)

could not make a will, (r) but that Laws now abrogated, (s) so that here we havenothing certain but what we receive from the

Canon Law.

ten pound Per cent. per an. is liable to all the punishments which the Canon Law inflicts, (t) and therfore seems incapable of making a

Will. (u)

7 Feme Covert is absolutely prohibited to dispose of Lands of Inheritance by heilast will, (w) or of Goods or Chartells, without the license of her Husband, (x) unsels the were an Executrix of a former Husband or any other person before the entermarried with this Husband, or hath any title to any summ of Money as yet unpaid, for in these cases she may dispose of the Goods by will, which he hath by reason of that Office, or by right of Action: and constitute either her Husband or any one else, her Executor, () but if we believe Braston, it was an opinion that a VVise might make a will, and dispose

of her reasonable part, which the should have had, if the had furyived her Husband, and specially of such things as were permitted or given her for Ornament, which they called her own, as Robes and Jewells, 3) but [2]1.2.c.26. this Law was either customary in some par- n. 1. F.N.B. fol ticuler place, or elfe it is long fince vani- 122, Flet, 1,2. shed:

8 Lastly, they which enter into Religion cannot make a will, for to those Goods which they dispose not of before entrance, their next of Kin succeeds, as if they had died intestare, (a) but it is otherwise of Ecclefia- [a] Bro.Teftam. flick Seculers, whose Goods are by the cu- 9. stone of England, reputed lay; whether they be acquired from the Church or otherwise, [b] Dr.and. (b) lo also is Corn growing upon glebe Land Stu.1.1.c.39. and not yet gathered. (c)

9. The King however in a capacity to 11. make a will, cannot by his Testament dilpose of his Kingdome or the Goods of his Kingdome, viz, his Crown or Regalia to another.

(d)

ar.

to. A Bishop or Abbot, in regard their [d] Fitz. A-Baronies were of the Almes and Charity of bridg devise 5. the King and his Predecellors, cannot a- and Execut. lienate any part of their Demesnes, as to the 108. Swin.p. Remainder, without the Allent and confirma- 2. Sect. 28. tion of the King-(e) [e] Glan.1.7.

11. So alfo a Bishop, Dean, or Master of c. I. any Society is prohibited to make a will of a- [f] Dr. and ny ofthole Goods which they held in com- Siu.1.2.c.39. mon with the Chapter and Society, (f) Braft.l.z.c. 14. Perk .469.

497.499.

[c]28.H.8,c.

Of the Dis-inheriting of Children.

TIT. XIII.

Ur Law remits that politive dis-inheri ting of Children , to which the Rime Laws obliged their Citizens, to the affiction of Parents, which it prelumes, nature to him engraven fo firmely in the minds of all, har it is not possible to be rooted our but both extream debeauchery of Children. When fore every one hath a free power of disposing of his goods, whether moveables or immore ables : And those whether purchased or delcending from Ancestors certaine, unlest it be of Pec-Taile; for that cannot be differ Sed of but where the Entaile is cut off by int and recovery, (a)

(2) 4. H. 7.C. 24.33. H. 8.c. 6. Plow. 356, &c. & Coo.1.3. cafe of Fines.

I. Yet the ancient VV titers of our Law doe scaree hold it lawfull for a man tobqueath by his VVill an Inheritance received from his Ancestors to any one but the new Heir, under which notion they will lay the burthen of the Fathers debts upon the Heir.

3. Braffes

(b) Glan. l. 6. (b) But our later times have provided? c.17. & 18. & fufficient remedy for this : (c) And therefore 1.7.6.1. Brac. 1. the Heir is not at this day lyable to the debs 2.c.36.n. 1. & of his Anceftor, unleffe he be specially menrit.c.34. tioned in the Instrument of Contract, and (c) 30. H. 8, have an Estate sufficient discending. C. I.

2. Bratton (d) makes this distribution of (d) L.2.c. 26. Chattells, Viz, That Debts being paid, n.1. Glan. 1.7. the overplus should be divided into three c.8. Plow. fol. parts, whereof one to be left to the Chil-418.

dren, the other to to the Wife, and the third at the will and pleasure of the Testator. And if there be no Children, then one halfe to the liberty of the Testator, and the other to the Wife: And if there be no Wife, then one moity to the Children, and the other as

the Teftator shall please.

But this rather feems to be Counsell then Law; for a little after in the fame place hee faith, That neither the Wife nor Children ought to take more of the Goods of the Father or Husband deceased, then what is particularly bequeathed unto them, except it be upon some speciall grace, as having merited extraordinarily of him in his life time. And he gives this reason, namely, because there would frarce be found any one who would endeavource lay up much, if hee should be compelled at his death to leave it to illiterate or debauched children, or so an ill wife, And therefore it is very necessary, that in this they should have a free power; for by this they prevent vice, and encourage verme, and give occasion both to VVife and Children of well doing : which could not be, if they knew undoubtedly, that they should have a certain portion whether the Testator will or not.

Of the instituting of Heires.

TIT. XIV.

THe Civillians and wee have a different

(a) Infl.de Te- nates in his VVill; (a) And we him, who is flam.ordinand. next of Kin to the party deceased, to whom a Fee doth of right belong, after the death of

(b) Glan.1.7 c. the Ancestor. (b) So that we affirm it is not 1. Brac.1. 2.c. man, but God, who makes Heirs: (c) And 33.8.3. Brit.c. that Heres comes from Hereditate, where suc-

118, 119. cession is by right of Blood. (d) Nor do we (c) Glan. & call all the Estate of the party deceased, his

(c) Glan. & call all the Estate of the party deceased, his Brit. ib. Inheritance, but only his Fee, or at less those (d) Brit. ib. Lands & tenements, with all things corporal

(e) lidem ib. held by a perpetuall Right. (e) VVherefore it was necessity which in some fort constituted an Heir: who, as he was wont to succeed

his Ancestor in the premises, even against his will, so was he obliged to pay his Debts, if he had Assets sufficient, and the Chartels did

(f) Glan. 1. 7. not suffice, (f) as we have in part declared c. 7. Brac. 1.2. before.

1. VVherefore an Heir with us doth not fucceed to the univerfall Right of the Party deceased, but to the Fee affigned only; for as to the disposing of Chattels, men nominate their Executors according to their pleasure,

pleasure (g) who as to that part of the Patri- g Glan.1. 7. . . 6 mony, supply the place of an Heire, and re- Brac.ib. present the person of the Testator, if at least Dr. Stuil: 2: they accept the Office, (b) fo that they may c: 10: convert all those goods which are not bequea- h Bro: Executhed to their own ule, (i) and take even the tors, 5:21,22: cloathes of the widow, if they are more \$7:77:84:122: rich and sumptuous then the condition of the i Plow: 943: Husband would bear. (4) k Bro. ib: 19:

An Executor may also be ordained either 1 Id, ib:9:0 absolutely or upon Condition, (1) and ei- administrat: 1: ther from a certain time, or after a certain & 45: time, (m) and either univerfally , or parti- m Bro: Exec: cularly, (n) and in the first degree, or by 155:

Substitution, (e) and either one or more. (p) n: 1d: ib:2, and

3. And those may be Executors, whom 155:L:Dier fo: the Testator shall constitute, whether they 3,4,n:7,8: be strangers or Parents, of Kinne, or not o Id: ibid: of Kinne, (q) and not onely those who are p Id:ibid:13:24 free, but Servants also, and those whether 38:117: our own or of others; (r) nor only Lay- q Brac:l:2: men, but even of the Clergy also, and Re- c: 26:n:2: ligious, (s) if they have the permission of t Lst:/:2:c: II: their Superiors, (1) fo also may women, (u) Browillains 68 and Infants, (w) and in fine, all who are s Bro: ib: 68:77 not expressely forbidden by the Law. (x) t Fitz.abrid:

4. Not that any one is against his will Execut, 47: forced upon this office, but that he that will u Bro, Execut: mayrefule, and he who hath once refuled, throughout may norwithstanding afterwards undertake w 1d:ib:15: it, (3) though according to the opinion of x Glan:1:7, some, he cannot during the life of his Co- 6, 6, 4, Executor, (a) but being once undertaken zero:ib:38.117 it cannot be laid down again, and the un- Perk:4:85. derraking of it feems to be, when he doth a Dier, fo. 160: under #: 43.

under that name intermeddle with any of

(b) 1d. f. 166, the Goods of the Testator. (b)

(b) Id. f. 166. n.10.11.

If an Executor die before the Will proved, then Administration of the Goods shall be granted by the ordinary to the widow, or near Kinsman of the Testator, who shall be obliged to dispose of the goods of the Testator, according to the Will, unlesse the Remainder of the Goods after the payment of Debts and Legacies were bequeathed unto him; for in this Case, the Executors of that Executor may justly challenge Administration which the Will annexed. (c)

(c) Id.fo.172

Of the ordinary Substitution.

TIT. X V.

Stlbstitution is of no small use with us, Sthough we do for the most part in this, follow the Precepts and Rules of the Civil Law, yet we cannot so freely dispose of those sees which we hold by Knights Service by our Testaments, but that we are obliged to leave a third part to the heir (a) but for those which we hold in Soccage not intailed, (b) or tied by any particular Custome, (c) we may be queath them to whom we will, whether to a Kinsman or stranger, (d) provided we hold no other Lands in Capite by Knights Service: and in each of these Cases we may make Substitution, either vulgariter (as they

a) 32.H.8.c.1.
Glan.l.7.c.7
(b) Brac.l.2:
e.30.
c.Glan.ib.
(d) 32 H.8.c.1.

Lawes of England.

nermit) or Pupillariter. Now this Substitution is nothing elfe, then the adding of a Condition, which we commonly call Tail; namely a limitation of Heires, to whom we intend to have the Lands discend from the Teffator, or remain, or otherwise revert to

us, and our Heirs,

1. Yeris por this Substitution the same with that of the Romanes, because that had this Condition annexed, viz. I ordain A. mine Heir, and if he will not be Heir, then my will is, that B. shall be my Heir. (e) now (e) Infit, eod. this of ours is not bound, but is rather tacitely imposed contrary to the Legator, as namely thus, I give and bequeath fuch a Fee to A. and if he accept it, then I will that such or such shall be his Heir or Successor. (f)

3. In like manner if we bequeath any c.1.Dr, Stud. 7. thing conditionally to any one, we make 6.24. Substitution to another, in Case the condition be not performed; for Example, I give a hundred pounds to A. when he shall marry a Wife, or if he shall not get a son of my Daughter lawfully, then I give the said hun-

dred pounds to B.

Of Pupillary Substitution.

TIT. XVI.

IN this Substitution we do not so much Iregard the power of our Countrey, as the Liberty

(f) westminst.2

hiberty of the Testator, so that a Legator may make a Substitution Pupillary, either to his own chidren or to strangers, Legates who are under age: As I give to A. (my own child or anothers) a hundred pound when he shall come to age: and if he shall de before then, I bequeath the same one hundred pounds to B. But in regard that Cass of Wills, are for the most part tried in the Ecclesiasticall Courts, and by the Rules of the Civill and Pontificiall Law: (a) therefore our Law, hath as it were, past by for the most part, this and other things of the same nature, and leaveth them to be determined by the Civill and Pontificial Law.

2 Bra.l.2.c.26

How Wills are invalidated.

TIT. XVII.

2 Perk.476.
479.480.Fulb.
paral Devises
fo.47.
b Stan.pl.corp.
l.3 c.20. and
c.32.
c.Bro.Exec.
throughout.

by those who are not permitted to make Wills; those who are, we have mentioned before, they may also be nulled by later Will, (a) or invalidated by Treason, or Elony after his Will made; (b) or if the Testator revoke his Will, or be deprived of the Executor whom he named. (c)

1. Suppose A. make two Wills, one in the fixth, the other in the eighth year of Eliz.

11

at length he is fick and speechlesie: B. his familiar friend comes unto him, giveth him into his hands both the Wills, and defires him to return that which he would have stand for his Will: A. returns that which was made the fixth yeare, in this Case, that will which he returned shall be efteem-

ed the later. [d]

please, [8]

The best are the

Blaire

sale to and the land to Carlante Sellot

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was strong and all about المراجع والمراجع المراجع المرا Webs being held, the he

2. And it happens sometimes, that a mans will, which according to the Civill Law is ambulatory, or alterable, untill Death, cannot be altered, in regard of prejudicing another Contract, upon which account the will was made; for Example, A. is scised of Lands in Fec, which he alienates to B. upon condition that they shall be his for life, to the use of the said A. the Remainder (e) in ip. Co. to C. and his Heires for ever, and upon Jamarcisc. & this, A. makes his last will, after having I. omnium. given the postession to B. This will (quatenus 19 C. de Testa. to the alienation) cannot be nulled by a la- f Dier. fo. 49. ter, and the Reason is, because the use of n. 12.

(d) Perk. 479

the faid Lands do immediately belong to C. g Id: fo. 325. to whom the Remainder is transferred; so n.73. that he may immediately fell them if he Perr. 480.

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Of those Wills which were calledy the Civilians Testamenta inofficiofa.

TIT. XVIII.

THe Plaint or Action in the Cafe of The I flamentum inofficiofum is not in ufegit us, for as concerning Lands holden by Knights Service, in case the Father do not leave his lawfull Heir, either while he live, or at his death, a third part, according to the Statute, the will is void, as to the part, [a] fothar the Heir may notwithftank [a] 32 H. 8.6.1 ing take possession thereof, or else if he hast gotten it, he may immediately himself it fule [b] the parcell bequeathed, or quit it, it b Brac.l.s.c 30 remove it by Law. [c]

n: 2: c Id:ib:

d Glan: 1:7:6:5: and 7: Bracil:2: c:16:n:2:

e Id: ib:

(f) Regist: fo: 142:b: F:n: 123:6:

1. For the disposing of Chattells, there are leverall Customes in severall places, of which there remain very clear fignes, in the ancient writers of our Law, [d] but by the Common Law the Testator had alwayes a Free will of disposing, [e] wherefore that writ which is called Breve de rationabili par tebonorum, which lies for the wife or children against the Executors, for the recovery of part of the Goods, [f] is not generall, but peculiar to certain Countreys, where the Custome is, that Debts being paid, the Re mainder

mainder should be divided into parts, vizione part to the wife, the other to the Children, and he third to be left at the will of the Teftator,

of the Quality and difference of Heirs.

TIT. XIX.

TEirs as they are taken with us, were necellary in time past, as to the driving an Inheritance from our ancient Predecessors to the next Ancestor, [4] (as they are now a Glan.1:7:0: 1 with us, as to part) [b] and that not onely b 32 H:8:6:1: as toa Succession in the Estate, bur also as to the drawing upon themselves the Debt of their Ancestor , [c] and they were also e Bracil:2:0:16 for ever bound and obliged to warranties, that n:7: is, to the affurances, which either they or their ancestors ingaged and promised to those to whom they fold any Land.

1. But for that it is evident, that children naturall and legitimate are preferred before others to Succession; it were not amisse to for the Estate and difference of Children, which really is very much, for of Children, some are naturall and legitimate, and of this lost, some are Sons and Heirs, some Sons, but not Heirs, some also are Heirs of the Father, some of the Mother, some both of Father and Mother, some also are not Heirs although legitimate, and naturall, some by

d) Brac.l.2. c. accident begin to be Heires, and some ceak 29, 30. to be so, so also of natural and legic Brit. c. 118. mate Issue, some are near, some more Coo.l.3. Rate. near, some are removed, some more remo-Case, fo: 40, 41, ved, [d] but of this elsewhere. 42. Plow: 28. Flet 1.6.c.1.

Of Devises.

That kind of Donation, which is in Case of Death, is, where the Testator had rather that himself should injoy the thing bequeathed, then that the party to whom it is bequeathed should have it; and yet, that he had rather that the party to whom it is bequeathed shall have it, then his owne Heire.

(a) Brac.1.2.

r. Our Common Law, although for the most part it leaves the Cases of wills to be tried by the Ecclesiasticall Courts according to the Rules of the Civil and Common Law; yet are there certan particular Cases of Lands and Chattells really, and which she hath reserved to her felf and those with as much brevity as we can, we shall sum up.

2. And in the first place, all may give Legacies, who are capable of making wills, and who they are we have formerly mentioned: but no man can rightly bequeath Lands or Tenements who hath northe poression of them at the

time

time of the making of the will, (b) which is b Fulb. Par.e. to be understood if no other person be not al- Devises so in possession in his right or name, for one fo.37.a.32.34. may bequeath a Reversion.

3. All men also are capable of Legacies who are not especially excepted by the Law, which are religious persons, and persons not yet in being, although they afterwards shall be: As if one makes a bequest to such a Colledge or Chantry; of which name though c Perk. 505 there be not any at the time of the Testators Fulb. ib. fo. 35? death, yet there happens to be one afterwards b.

(c) but a Post bumus, in favour of Testaments.

Although he be in the Wombe is notwitstandevise

Gift to his wife in his life time, because they are both adjudged one and the same person during Matrimony, yet he may give and bequeath Lands unto her by will in regard that Legacies take no Effect before the death of the Testator by which this conjunction is e Fulb.ib.36i

diffolved. (e)

5. One may also give a Legacy to an uncertain person which may afterwards be rendred certain, as an annuity is given to A. for life, and after his death to him who shall first in the Morning enter Saint Pauls Church, and to his Heires. B. enters in the morning before any one else; this Legacy shall inure not only to A. but to B. and his Heires also. f 1d.ib.

6. A Body politick, unlesse by the Kings particular Charter is not in capacity of receiving an Estate bequeathed. (g)

g Perk.505

7. By

(h) Id.537. Brit.c.34.27. H. 8-c. 10.Dr. Stu.1.1.6.7. and c.20. Dier. fo.74.n.14. [i] Glan.l.7.c. 1 . BYACT. 1.2.C. 26. Dier.fo. 127.11.54. [k] Lit.l. 2.c. 18.F.N.B. 198.1. Therk 528. [m] Id.ib.97. [n] 32.H.8. c. I . Bro.teftam. 19.Swinb.part. 3.5.4. Coo.1.7. Cafe. Butler. 10.30. (e) Dier. 155. 7.2 I.

7. By our ancient Law, Fees could not be bequeathed by will, (b) but necessarily difcended to the next Heires, (i) (except contrary to the Common Law, the particular custome of any City or Corporation permitted (k) unleffe the Heir consented to such bequests. Whosoever therefore would by his will give Lands to another, did first infeoff one in them to the use of himself, and his Heirs, (1) and by this means he might bequeath the use of the said Lands, although he could not the Lands themselves unto a third person, (m) but later times have remedied this inconveniency, or rather, poor and weak comment, and hath decreed, that not only ules but even the Lands themselves with fome moderation may be bequeathed (n) for of a Knights Fee we are yet obliged to leave the Heir a third part and we are prohibited the bequeathing of Lands by a will nuncupative, in regard of the deceit and fraud they are subject unto. (0)

A. If a man and his Wife iountly purchase Lands to them and the Heirs of the man, and the Husband bequeath them after the death of him and his wife to a stranger, this is good? For in this case the Husband hath

the Fee-fimple. (p)

[P]Perk. 539.

9. If there be two Joynt-Tenants in Feefimple, where by the custome of the place Lands and Tenements may be given by will and one of them bequeaths his right to a third person, this is void. For since a Will is not in force untill the death of the Testator, the right of a Joynt-Tenant at the very instant inftant of his death is transferred by law unto his fellow, (q) which notwithstanding is o- [q] Inft. Fur. therwife in Partners, because Partners have Com.c.15 their Lands by blood and Inheritance, and nor by the Courtefy or pleafure of a Donor, loynt-Tenant have theirs, (r)

to. A man may also appoint by his will that his Executors may fell thole Lands which he hath in Fee, and which he may bequeath, and that the profits arifing from fuch Saile may be imployed for pious uses, or for the good of his Soul: (s) but it they shall [s] Perk.422. cease to fulfill the command of the Testator, 541.543.21.

them, and eject them. (1)

11. A. being Tenant in Socage gives the Devises fo. 40. Lands which he hath in Fee-fimple to his Plow. fo,523. wife for rearm of life, the Remainder to B. his Brothers Son, and the Heires males of his Body; and if it shall happen the faid B. to dy without Heires of his Body begotten (not expresly nor implicitely naming males) there the faid Remainder to C. another Kinfman, and his Heires males in Fee-fimple, and for defect of Heires males of the laid C. thento the next Heirs males of the faid lineage lawfully begotten. B. dies leaving only Iffue, D. a Daughter, the question is whether D. shall have the Lands by force of those words [and if it shall happen, &c.] or some other Heir male more remote: But it was adjudged that rhose words did not create a general Tail to the Heirs of B. or hinder the Lands from remaining to the Heirs males, [u] Dier. 171 according as devised. (")

(r)1b.

within two years, the Heir may enter upon H. 8.c.4. [t] Fulb.par.c.

12, Chartells #.7.

[w]Perk.511.

thed by will, (w) wherefore the profits arifing either from the custody of a Body, or Lands of a Ward, a Lease for years, Horses, Oxen, Sheep, Gold, Silver, either in Plate, or Money, Rings, all manner of Vessells, without exception are diviseable: (x) unlesse the Testator had but a Joynt possession of them at the time of his death (y) and unlesse they be affixed to the Fee or Free-hold, and cannot, being reputed parcell of it, be removed without wast. (3)

13. Monies also due upon Bond or Condition may be devised, for that after they are paid to the Executors, they are due to the Le-

gatee. (a)

of his Wife, as Leafes for years, &c. are deviceable. (b)

fed, so long as it may be reduced to certain-

ty by the Legatee. (c)

opinions among st our learned Lawyers, and that according to the diversity of Species in the cases of Corn, & c. sowen by those who had Land in possession, and not severed from the Soil. For example, Tenant in Dower sowes Corn, and dies before Harvest: She may devise the Corn, though not yet ripe, (d) which is true also as to those Lands which she holds Joyntly or severally under the notion of Dower. (e)

17. But if contrary to custome she be endowed by the Guardian of the Heir, and dy-

x Id.525.

y Dr. and. Stu.! 1.6.6., Lit.!.3.6.3. Z. Bro.Execut.

65.

20Perk.527.

b Id. 560 .

e Fulb. par. 38. b.

d Perk.511. Stat.Merton.c. 2.Flet.l.2.c.

37. e Ferk.513.

Pulb.17. ural. Devises 38.

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Lawes of England.

ing, leaves Corn growing, her Executors may be ejected by the Heir when he comes to age, and hindered from gathering the profits. (f) So if the Heire coming of age reco- (f) Perk. 524. ver Lands against his Mother, or Widow of his Ancestor in a writ of Admeasurement of Dower; he shall recover not only the Lands but the Corne also, which is by him deviteable. (g)

18. Tenant by the Courtesey leaseth forth his Lands, and dyeth. The Lellee shall reap his Corn, and may, if he dye before it be ripe, devise it, (b) which may also be done by a (h) Id. 514. Parlon of a Church as to his glebe Lands. (i) (i) 28. H. 8.c.

19. So also he who hath Lands in right of II. his Wife, his VVife dying after the Corne fowen, may reap the benefit, ar devise it, (k) (k) Perk. 518. which his Leffee also [in case hee have leased Lit.1.1.c. 8. out the faid Lands may doc. (1)

20. Execution is taken upon a Mannor of Fulb. par. fol. the Debtors by vertue of a Statute Merchant, 37.b. The Creditor sowes the Land, and before Harvest, a Tenant of the said Mannor dyeth, the Custody of whose Heir [being under age] fatisfieth the Debt: This will not hinder, but that the Creditor may also devise the Corn not yet ripe, or gathered. (m)

21. Mony is paid at the day upon a mortgage, yet it feems the Creditor [although some are of a contrary opinion] may devise the Corn which he fowed, and which as yet remains ungathered. (n)

22. Tenant in Taile leaseth out his lands for life : The Leffee fowes Corn, the Heire recovers upon a Formedon in the Defcender,

(g) Id. ib.

(1) Perk. 513.

(m) 1b. 516.

(n) 1d. ib.

devise by Will. (0)

(o) Perk. \$20. Fmb. fol. 37.b.

leaveth an only Daughter, and a VVise with Child: The Daughter enters, and sowes the Land; but before Harvest the VVise is delivered of a Son, to whose use the next Kinsman possesses the Daughter may devise the Corn. (9) But we will put the case thus: The Mother before the Sonne is born recovers Dower against the Daughter, and hath that part alsigned by the Sheriste which the Daughter sowed. In this case she may devise the Corn, yet it is a Quære. (9)

(q) Perk. ib.

(p) Perk. \$21.

Fulb. fol. 38.a

24. Tenant for tearm of yeares commit waste, upon which the Lessor recovers the Land. In this case the Lesse cannot devise the Corn: (r) Neither can he, if another upon a more ancient Title recovers the said

(r) Id. 315.

Land against the Leffor. (s)

(s) Id. ib.

25. Lessee of a House for forty years deviseth the said House to A, without mentioning the Title which he hath, or giveth. The Question is, what he deviseth? And it is adjudged that the Testator deviseth that title which himselfe hath, Viz. The term of forty yeares. (t)

(t) Dyer, fol. 377.n. 69.

26. Lessee for years bequeatheth his Interest to A. the remainder of the years to B. in cale A.dye before the term expired. A. is in possession by vertue of the Devile, and not long after Aliens his Right, and dies before the

the terme expired. The Question is , what remedy B hath to recover his Right as to the remainder of the years unexpired ? And it was adjudged that he is without Remedy: (a) But if the Testator had devised so many (u) td. fol. 75. years of the Lease to Aas A should live, and n.18. of. 140. had ordered B. to succeed in the residue. In n. 41. this case A. could not have so alienated the (w) Dyer, fol. Term, but that B. should have succeeded in 358. n. 52,51. the Remainder unexpired. (w)

17. Diffeisee recovers against the Diffeifor: The Diffeise may devise the Corne fown; but if it shall be severed from the ground, the Diffeifor may take it away, or devise it, (x) yet he shall pay the Ditleisee

Damages. (y)

28. A Testator can neither devise Actions (if they be not Judgments) nor instruments of Actions: (2) but hee may, that which is due upon Action : Yet is this devise conditionall, namely, if the Debt be paid or recove-

red by the Executors. (a)

29. Our Law respects principally (as doth the Civill Law and Reason likewise) the will of the Testator (b) (if not contrary to Law) If therefore a man having both a Sonne and Daughter living, devileth his Lands to his Daughter: Although the Sonne be more worthy, yet the Daughter shall have the Lands, (c) If he adds and annexeth a Con- (c) New terms dition to the devise, which is neither impos- v. devise. fible in Nature or Law, this shall suspend (d) Brit. c.36. the devise untill it be performed : (d) And Perk. 570. Brac this is so farre true, that sometimes words 1.2.c.6.n. 1,2, are extended beyond their naturall intent; 3. Swinb. part

& fo.359.4.51.

(x) Perk.519. (y) 6: Ed. T. (Z) Brac.1.2.c. 26.a.28.n. 2.

& 1.5. tr.5.c. 10.n.3. Fulb. fol.30,31.

(a) Perk. 527. (b) Cook. 1. 3. Buslers case, fo. 27. Fulb. fol. 46.Plow. 343.

(e) and 4. Sett. 13.

(i) Id. ib.

(m) Id. ib.

(e) See the reft (e) and sometimes for causes restrained, (f) by reason of the conjectured will and meanof his tit.

(f) Fulb.41. ing of the Testator.

30. A.deviseth Lands to B.conditionally, Plow. 540. that he pay so much money : Although by force of words B, hath an Estate for life only, yet the Law adjudgeth him to have a

Fee-simple, (g) for otherwise if B. should dye (g) Brac. Teft. 18. Perk. 555. in a short time, He might receive more pre-

judice then profit by the Devise.

31. A. deviseth all his Lands and Tenements to B. B. shall not only have all the Lands and Tenements which A. had in pol-

(h) Termes, v. session, but the Reversion likewise. (b) Devises.

32. If Lands be bequeathed to One, to have any to hold to him for ever: Or to have and to hold for him and his Assigns for ever : In both Cafes the Devifee hath an Estare in Fee-simple, although there be no mention of Heires, (i) which notwithstand-

(k) Pak. 557. ing some affirm joyntly. (k)

33. If a man bequeath Lands to another in these words, I give my Lands to A. to give them, or fell, or dispose of them at his discreti-

on: This is a Fee-fimple, (1) (1) Terms, ib.

34. A Testarator bequeatherh Lands to A. and the Heires Males of his Body: A. hath Isue only, a Daughter, and of her a Grand-son. In this case the Grand-son thall succeed in the Lands by force of the Devile, rather then the Devise shall remain ineffe-Auall; notwithstanding that in other Donations it is otherwise. (m)

35. If I devile Lands to my Son after the death of my Wife, although I doe not exprefly

prefly give it to my Wife, yet our Law telpes her by a favourable Construction.

(n)36. I devile a Fee-simple to A. for a roo. reares, upon this condition, if that he shall pay ten pound yearly to B. the remainder of fol. 17. he faid Lands to C. and his Heirs. In this ale, although A. shall break his Condition, vetthe Remainder as to C, is not hurt, alhough the Law be contrary in Contracts made amongst those who are living. (0)

37. A man deviseth all his Lands to A. 565,566,567; upon condition that he give a 100. pound: 568, 569. and in ease the Condition be infringed, hen to his owne Family. In this case our Law determineth this Devise to belong to himwho is next of Kinne to the Testator by

blood. (p)

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38. A man deviseth to another all the Grain which he hath in such a Barn; And after the Will is made, hee puts more Grain into the faid Barne. In this case the generality of the words is restrained to that which was there at the time when he made his VVil, for that the Law presumes the Testator to

have meant only of that. (9)

39. A. after many Legacies in his VVill Plow. 341. devileth the Remainder and residue of all his Goods to his VVife E. in thele words : The residue of all my goods I bequeath unto my deare Wife E whom allo I doe ordaine full and sole Executrix of this my last will and Testament] to be disposed of by her for the good of my soule, and the payment of my debts. E. takes upon her the Office of Execution, and payes all

(n) Id. ib. Pl. 414 Bro. Exec. 175.13.H.7.

(o) Perk. 504.

(p) Fulb. 46.

(q) Id. fol+41.

Debts and Legacies. Afterwards she entermarryeth with B. who getting possession of the said Goods (having made his VVill, and ordained his Executors) dyes before E. Here the question is, whether the Goods which E. brought to her second Husband, shall revent to her? Or whether they belong to the Executors of B. And it was determined, that they should revert to E. because the residue of the Goods were destined to certain uses, and not left to her disposing. (r)

(r) Dyer, fol. 331; n. 11.

pound, and indebted 20. pound, divides his Estate by his Will: One moity to B. his Wise, the other moity to his Executors. The question was, whether B. shall have 50 pound, or 40 pound, and it was resolved that the might claim 50. pound: But if the Executors had aliened any of the Goods in Specie, that then she could not challenge any of those which were alienated, because they were alienated. (5)

(s) Dyer, fol. 164.3.57. (t) Glan, l. 7. c. 7. (u) Perk. 570.

(w) Id. 576, 577, 578,

579.

(x) Dr. & Stu.

41. Devises and Legacies are to be suite for in the Ecclesiasticall Court: (t) Yet some restrain this assertion only to Chattels reall and personall; (u) for that the Ordinary cannot take Cognisance of Fees or Freehold (w) devised. But a Prohibition will lye, if any Judg of any Spiritual Court shall cyte one before him in case of such a Devise as intrencheth upon the Common Law. (x)

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TIT, XXI.

7 Hereas the Civil Law doth, ipfo fatto, V null the Will for default of an Heir, (a) Ours doth not presently suffer Devises (a) L. 10. w.de to become void for want of an Executor, or jure codillo-for default of an Executors undertaking the rum. Office, but appoints Administration of the Goods to be committed to another, according to the Judgment of the Ordinary, who obligeth the Administrator to the payment of Legacies, at least as farre as the Estate will reach. (b)

1. Lands, Tenements, and other Heredi- cutors. taments whatfoever, deviled by a Testator: Ifthey shall happen afterwards to be alienated by him, and are again redeemed: They are equally due to the Legarce, as if they had

never been alienated. (c)

areast recently by the second of the the behavior of the black of the ROSE OF STATE OF STATE

(b) Bro. Exe-

(c) Id. Devise,

Of that Law which the Romans called Lex Falcidia.

TIT. XXII.

THe first duty of an Executor taking upon him the Office, is to fatisfic the Debts of the Testator; and therefore it wil not be amilie to confider what Antiquity hath adjudged in these cases. If there be Debts owing to many [faith Bracton | [a] one may be preferred before another. The King is first, and it shall Glan. 1. 7. t.5. be lawfull for the Sherifte, or any of the Flet. 1. 2. C. 57. Kings Bailiffs [shewing the Kings Letters Patents , De Summonitionibus (caccari) to take an Inventory of fuch Goods and Charrels, as they shall finde in the Lay-fee of the party deceased, and to attach them to the value of the Debt which is coming unto the K. per vijum legalium bominum [as we call it] fo that nothing be removed or taken thence unrill fuch a Debt as shall appear due be payed, and the refidue of the Chattells to be left to the Executors. To the acquitting of which Debts or any other, the Wife of the party deceased is not to contribute any thing out of her Joynture, for that the Wives Joynture ought to be free, [b] which holds true, except where the Husband is indebted to the King before the Title of Joynture. second place are to be deducted debts due to others, fuch as are clear and acknowledged;

amongst which are to be reckoned services

2 L.2.c.26.

[b] F. N. B fo. 151,4.

and Servants wages, provided they be certain: But if they be incertain, although they depend upon courtely : Yet if their flipends shall be fet by the Will of the Testator or his Friends, they shall be deducted out of the Goods of the deceased, so shall Funerall Charges. The Wife also shall have her necessaries, even her lodging in her Husbands cheife Mansion house for 40, dayes, unlesse

her Dower be sooner assigned.

1. But that the Estate of the Party deceafed may the better appear, the Executors or Administrators, with the privity, and by the affiftance of two at the least of the Creditors or Legatees: Or if they refuse, then two of the next of Kinne [provided they be unconcerned of the Deceased : Or upon their denyall, then of any two honest men, who are obliged to take true and faithfull Inventory of all the Goods and Chartels, Moveables & Immoveables, which the Party deceased had at the time of his death, and to write all and fingular the faid Goods justly apprized in 3. Charters or Tables indented: The one to be referved to themselves, the other to be delivered to the Ordinary; But if the Testator had appointed any of his lands or Tenements to be fold, the money or profits thence arising are not to be put into the Inventory. [6]

2. But the Heirs are obliged to fatishe the c.5. Swinb.part Debts of their Ancestors, which the Chartels will not luffice to doc. [d] Yet if the whole Estate of the Testator would not suffice to pay Debts then, the Kings Prerogative excepted, there used in former times to be a defalcation every where. [e]

[c] 21. H.8. 6. Sett .9. d Glan & Brac. ubi sup.

3. And [e] Brac. ib.

3. And even at this instant the Law is, that Legacies are not to be paid before debts be satisfied; for in such cases the Executor is bound to pay the Creditors out of his own

(f) Dr. & Stu. Estate, (f) yet is hee not tyed to pay every 1, 2, c, 11, Bro, one that demands a Debt, but those only Execut. 116, against whom the Testator, had he lived, could not have waged his Law. (e) Perk. 488.

(g) Bro. ib.79. 87.127.163.

c. 18.

54,55.

6.Sett. 16.

(k) Bro. ib. n. 88. 172.

n:54.

(m) Swinb .ubi Super.

[n] Bro ib. n. 33. 87. 127. 163. [0] Id. ib.

4. The ancient Law feems to be somewhat changed, as to the priviledg of Creditors: 172. Dr. & Stu Yet even now it feems that the Executor 1. 2. c. 11. Plo. may in the first place allow moderat Funeral 181. Dyer, fol. charges, and then fatisfie Creditors accor-23. n. 144, 145 ding as the Law prescribes : and of those, the & fol, 80.n.53, King is first by his Prerogative. (b) Next him, those to whom the Testator was obliged

(h) Mag. Char. by Statute-Merchant, or Recognisance. In the third place, those who have Judgments (i) Swinb.part against the Testator. (i) Fourthly, penall Obligations : (4) And of these those have priority, whose dayes for payment are lapled, (1) and of those [if there be many] they who (1) Dyer fo. 80. fue first But if they commence their fuits together : Or that dayes of payment be not yet come, then it is in the power of the Executor to gratifie whom he pleaseth. Next to penall Obligations follow simple Bills, (m) as wee call them. And laftly, Contracts without writing, against which the Testator could not wage his Law, As Servants Sallaries, and Rent of Lands or Houses, whereof the Testaror was Leslee for years or life, and the like. [n] But as for made Contracts, Executors are not obliged to pay them: 0] Yet according to the opinion of some, thele have their remedy in an Action upon the case upon a promite of the Testator. (p)

5. If a Creditor be made Executor, hee Execut.
may in the first place satisfie himselfe, after
which he is bound to pay the other Credi-

tors out of the refidue. (9)

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6. If after Debts paid, there remaines enough to fatisfie Legacies, every Legatee may of right claime his whole Legacy; Otherwile only according to the proportion of the Estate, and the quantity of all the Legacies: Yet so, that the Executor may first deduct charges, bona side expended, and desperate Debts: But under the notion of lex salcidia, we have not any thing, nor is there any thing in that nature required from the Office of a Judge: But as to those Goods which are not devised, they are convertible to the use of the Executor. (r)

7. Executors of Executors are obliged to the payment of the first Testators Debts, unlesse his Goods appeare to be fully admini-

fired by their Testator. [s]

which is well brook desides so it

artisque de la servicio del servicio de la servicio del servicio de la servicio della servicio de la servicio della servicio d

P Termes, v.

q Plow. fol. 185.

r Perk. 525.

s Dyer, fo. 174. n. 21, & 22. 25. Ed. 3. Stat. 5. c. 5.

- L-4-

of

of those Trustees which the Roman called Fidei Commissarii Hæredes & ad sanatusconsultum trebellianum.

TIT. XXIII.

Hele Inheritances are out of use withus, yet those Trusts are something parallel

Lands to Strangers to the use of us and our Heirs, or to private persons to the use and profit of a Body politick. But those inventions of Uses being injurious to the Prince, and to the Lord of the Mannor, (a) are by Acts of Parliament either wholly taken away, or at least for the most part altered. (b)

b 1.R.3.c.1. 4 H.7.c.7.27. H.8.c.10.

[a] Coo.l. I.

fol, 123.

Shudleys case,

of things left Per fidei commissum.

TIT. XXIV.

OF those things which were by the Romans termed Fidei commissa [excepting those which are appointed to the next Title] we have no mention in our Law, they being

Lawes of England.

left wholly to the Civill Lawes definitions.

of Codicills.

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TIT. XXV.

The terme Codicillus is seldome used with us; wherefore in this we only follow that which we borrow from the Civill and Common Law, unlesse it contains either a Fee or a Free-hold. In which cases they are to be proved only before an Ecclesiastical Judge, and to receive their Interpretation according to the Lawes of the Land.

The End of the Second Booke.

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ENGLAND.

Of Inheritances which are conveighed from such as dye even Intestate.

TIT. I.



HERE is also another way of gaining Dominion, which is by Succession, and which happens to all Heirs of such things whereof their Ancestors dyed, seised in Fee, or

whereof they were at any time seised, as of Fee by Right of Inheritance, without having alienated them. And this Discent ought to be to the next Heirs, Males or Females, in a direct or transverse line: Wherefore Right,

ke all heavy things falls downwards direely or transversely, nor doth it ever ascend he same way, by which, by the death of the ncestor it discends, yet doth it collaterally scend, sometimes for want of Heirs to whom a Glan.1.7.c. may discend. (a)

1. A Right discends to the Heir, wherebever born, whether in the womb, or beyond Stu.l.1.c.7. or on this fide the Sea, and that whether Flet.1.6,c.1. vithin or without the Dominions of the and a 2. king. Provided, his Parents be the Kings Leige People, and that the Mother went over Sea with her Husbands leave, nor can any man create to himfelf an Heir, because God only makes them, and because, Heres, is not ab Haveditate, but Haveditas ab Herede.

2. Now Inheritance is a Succession to the whole right, which the Ancestor deceafed had in Fee, upon what cause soever, whether by Acquisition or Succession, with Seifin or without, and if by Seifin, then at whatloever he was seised, either in his life time, or at his death, namely upon the day, on which he died, and if the right difce nd to more Heires, successively, and without Seifin; yet the Heir hath the same Seisin appertaining to him as the Ancestor had in the time of his life, or at his death. And where there is a participation or meeting of Propriety Brack.ib.25. with the Seisin, the Heir hath immediately, Ipiofacto, a Free-hold. (b)

3. Our Authors do not make in the case of 10. Flet.l.6.c. Heirs a like division, some distinguish them I. into nere and more Remote, (6) and some c Glan.1.7.6.3

I . Brac.1.2.c. 29.2. I.Dr.and

b Glan, and. E.3.Stat.2. and 42.E.3.C.

into

into neer and more neer, remote and more remote, [d]

4. If one have many Sonns they are all

d Braft 1.20.c. 30.n. 1 Brit.c. 1 18 Flet.1.6. C.I.and 2. & Bract.ib. f Glan.ib. 2 Braff.ib. h Glanib. i Dr and Stu. L.I.c.7.and

C.20.

neer Heirs, those that were last born, and those that were boin before them, (e) and to are Daughters when Sons faile. (f) The next Heir, is he who was born first,

(e) unlesse the custome of the place hinder, (b) or that he be a stranger, and the younger

Brother a Denizen, (i)

6. An Heir remote is where one hath many Sons and Daughters, the Sons are neer heir and the Danghters remote, this holding alwaies for a Rule, that the males shall be preferred before the females of the same degree, (4)

7. If there be many Sons, and no Daughters, but Grandsons, the Sons shall be neere Heires and the Grandsons remote, (1) if there be many Daughters and no Sons, they shall

be all next Heirs, (m)

k Braff. l. z.c. 30.11.3. 1 Id.ib. m Glan.ib. n Bratt.1.2.c. 30. o Dr. and Stu.

1.6.c.1.

8. So may they be tearmed more remote in respect of the Inheritance, being more remore as the lineall Nephew or Neices Son, ib. Glan.ib. Flc. his Grand-son, his great Grand-son, his great, great Grand-son, &c. In the direct line, or if there want of that line, then in the

transverse, Ad infinitum. (n)

9. It is the ancient custome of England, that the eldest Son should succeed as Heirto his Father, but where there is no Son but Daughters; then all the Daughters shall be Co-heirs, (o) which is also true in Nephews, & their Children, where males are wanting.

10. And this was alwaics a Maxime, that a Fce

Fee-simple could never ascend from a Son [p] Coo.L.3.fo. o a Father or Mother or any other Ancestor, 40. Ratisfes na direct line, (p) nor can any one in a cafe. Dr. and. ransverse line, succeed, so long as there is an Stu.ib. Brack.t. Heir, to whom it may discend in the direct, 2.c.29. Lit.l. I.

11. That Isue which is born before marri- q Brack . 1.2.c. ige is by our Law a Bastard, nor can it suc- 31.n.1. Flet. reed in an Inheritance, nor can a Ba-1.6.c.3. stard have any Heir save of his own Body. T Dr. and Stu.

ib.20.H.3.c.4. (r)

12. Chattells neither personall nor reall Perk.49.50. come unto the Heir but by the custome of the Kingdome to the Executors, or from an Intestate to the Ordinary; and from him to the Administrators whom hee shall appoint, (s) or if no body will administer, then ought the Ordinary to sequester them upon his own perill. (t)

13. The Lord of the Mannor is in stead of Heir, when either through defect, or in case of Felony, the blood is extinguished, (u) yet at this day this is not without distincti-

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s Glan.l.7.c. 16. Perk. 48. t 13.E.1.c.19. 31.E.3.C.1. 21. H.8.c.s. Flet . 1. 2. c. 57. Dier.fo. 277.7. u Flet,1.6.c.I.

Of the legall Succeffion on the Fathers side.

TIT. II.

IN the transverse or collaterall line, the Kule is, that those are Helrs who partake of of the whole Blood with the party decealed. For example, A. hath Issue B. a Son, and C. a Daughter by one Venter, and D. a Sonly a second Venter, and dies B. succeeds him and dies without Issue, in this case C. the Sister shall succeed and not D. (a)

2 Lit.l. 1.c.1. Brit.c. 119.n. 7.Flet.l.6.c.1.

b Lit.ib.Coo.l. 3.Rat.cafe fo. Sons, viz. C. by one Venter, and D. by another dieth, to whom C, succeeds and dies without Issue, in this case B. the uncle who is of whole blood shall succeed, and not D. the Brother, (b) but if B. dy without Issue than D. shall succeed, being of intire blood with him both by the Grandfathers side and Grandmothers: And therefore, if B. had not been Brother to A. both by Fathers side and Mothers side, it should have been other wise.

2. The collaterall line is double, one defcending by the Brother to his Children, the other ascending by the uncle, but none succeed on the ascending line, but for defaulto

Heirson the descending. (c)

3. He is Heir in the collaterall discending line, who is neerest in degree, and if this line fail, then he who is next to the party deceased in the ascending collaterall line,

d Bractib.Fle.

c Bract 1.2.c.

119.

30.n. I . Brit.c.

e Brit ib.n.t.

4. If there be two in the same degree, and both males, the elder is to be presented; but if they be male and semale, the male is Heir, as in the direct and right line. (e)

fide, there the Son dying without Islue, the next of kinn on the Mothers fide is Heir, and

no

not the Brother of the Father, [f] but where f Id.ib. the Son purchaseth an Estate with his own Mony and dyeth without Islue, there the next of kinn on the Fathers fide shall fucceed; and not on the Mothers fide, unlesse for defect of Heirs on the Fathers fide, (g) but g Lit.1.1.c.1. the Heir on the mothers fide shall succeed, Coo.1.3. Rat. rather then the Land shall escheat to the case. fo. 39. Lord. (h)

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6. A. hath two Sons, B. and C. B. in his Fathers life time commits Felony, and is punished with Death, after which A. dies, the question is whether the Fee whereof A. died seised, shall escheat to the Lord, or discend to C. the Iccord Son, And here it is to be confidered, whether B. dyed without Isfue, for then it discends to C, otherwise it shall escheat, (i) but if B. had been condemned i Dier fo. 48.7. living his Father, and survived him; In this 15. case notwithstanding his dying without Islue, the estate should have escheated and not discended to c. (k)

h Plow. 444.

k Kitchin, tit. Escheat,f.110.

Of the Tertullian Decree.

T I T. 3.

7EE in the case of Fees follow the V Rigour of the twelve Tables, which will by no means fuffer an ascending from a gratt. 1.2.c. Children to Parents, (a) wherefore if this 29,n.I. feem harsh to any one we shall wish him a

Tertullian,

Institutes of the

Tertuilian, or Claudius, to perswade our Se nate to the contrary.

Of the Orphitian Decree.

TIT. IV.

2 Flet .1.6.c.9.

Children with us doe equally, succeed to Inheritances comming from the Fathers or Mothers side, and that by the same rules, and in the same degrees, (a) whereforem have no need here of an Orphitius.

Of the Succession of Cozens by the Mothers side.

TIT. V.

a ult. S. I. ... de gradibus affinitatis. b viz. The first and second of this booke.

The Romans called those particularly, Cognati which were allied by the semale side, (a) but there remaines nothing to be spoken of them, the two former Titles being considered, (b) where we have shewn: That these are never to succeed as Heires, but for default of Heires on the Fathers side; which is so to be understood, that the most remote Cozens on the Fathers side discending in a direct line, but not in a collaterall, are to be preferred before the neerest on the Mothers

de, for the great great Grand-child of my neall Niece, or of my Sifter, shall succeed to before my Sons or Daughters, Cozenserman (6)

r. This breifly I thought also to insert, that or default of Heirs in a right line discending rin each collaterall line, the Land shall scheat to the Lord of the Fee. (d)

(c) Brast. 1.2. c.30.and 31. (d) Glan.1.7. c.17. Brast.1. 2.c.29.n.1. Lit 1.1.c.1.F. N.B.143.

Of the degrees of Con-Sanguinity.

TIT.VI.

Aving mentioned degrees, it is requisite to take a view of the persons who are in possibility of succession, and who are presented before others in succession, from the fift degree of the same line to the last. [a]

I. In the right line ascending are these, 31.n.2. Grand -Father, great Grand-Father, the great Grand-Fathers Father, the great Grand-Fathers Grand-Father, the great Grand-Fathers great Grand-Father, and so ad infinitum. (b)

2. In the right line discending, Father and 6.6.2. Mother are first which make the common root, then Son and Daughter, the Nephew and Neice, and so, Ad infinitum. (c) c Brain

3. In the collaterall line ascending, Brother or sister, of Father or Mother make the

a Bract.1.2.c:

b Id.ib.Flet.l.

c Brac.and Flet.ib.

Institutes of the

second degree, and so their Heirs, Adinfinitum. (d)

d Id.ib.

4. In the collaterall line discending as Brother and Sister, and their Heires, Ad in finitum. [e]

c Idab.

Of the Consanguinity of those who

TIT. VII.

a Wesenb. in the ;

This Title is with the ancient Civilians reckoned as part of the former (a) not doth our Law determine any thing in the cases of such as are manumitted, command to the rules of those who are born free, then Marriages being a like lawfull.

Of the succession of such as are made free.

TIT. VIII.

Patrons are not with us admitted to futceed those who are made free, in case they dy without Issue, where fore if any one purchase a Fee after Manumission and dy without Heirs, the Lord of the Fee shall claim it by Escheat; and not he who gave the party deceased nin

deceased his freedome, (a) the same rules a F. N. B fol. are also for the Chattells of such dying In- 143. T. &c. restate as for those who were born free.

Of the affiguration of such as are made free.

TIT. IX.

There is no difference with us between those who are manumitted, and those who are born free, save that they some time were Servants, wherefore we have no use of this kinde of Assignation in our Commonwearh.

Of the possession of Goods.

TIT. X.

THE supream power with us gives the possession of a Fee to the Heirs of them who hold the Fee of him by any kinde of service in capite, for he by his Prerogative hath the primer seisin of Lands, (a) nor can the Heites receive them but by his hands, those who hold of other Lords by Knights service (much more Tenant in Socage) so soon as they come of age, enter upon their Estates by right, and in case their Lords hinder M 2 them,

a Stan. Prerog. c.3. and 13.F. N.B. fo. 255. and. 256.c.

Institutes of the

them, may have their Action, having fatisfied the value of their marriage. (b)

Chattells, the Ecclesiasticall Judge, who is in stead of the Ordinary, give possession of them according to the Will, or at least confirm the possession being taken, to the Executors of the party deceased, but if there he no Will, then he grants Administration to the widow or next kinsman of the party deceased, yet so that the goods shall be distributed according to his Judgement, either amongst them, or for pious uses. (d)

[c]31 Ed.3. e.11. [d] Linw.provin.

> Of acquiring by Adrogation or Adoption.

TIT. XI

There is nothing hinders, but that the English may advogate or adopt, and be adopted, but in this Case, the consent of both parties is solely essentiall, for our Law determines nothing of this kind of acquisition, unlesse that which naturally falls out between party and party in contracts.

Tient Person Larca

date that I bed himser

Sugarty.

of him to whom Goods are granted for Liberty.

TIT. XII.

As for those Servants, who receive their Freedome from their Lords by Testament, the cheif thing is the performance of the Will, for it is not materiall whether the Executor will accept the Office. For we have shewn before, how ungratefull that old solemnity of the Romans, in Case of Wills is to us.

Of Successions which were amongst the Romans by the Sale of Goods according to the Claudian Decree.

TIT. XIII.

TE have not this kind of acquisition amongst us, yet have we something like unto it, for the Fees, and all other the Goods of Banckrupts (who having consumed their fortunes withdraw themselves, That their Creditors may not arrest them)

M 3 where-

wheresoever they be found are divided towards the satisfaction of Creditors, by such Honourable persons, whom the Statutes in this Case mention, (a) but above all that most famous Act in King James his time doth most carefully provide in these Cases. (b)

[a] 34 H.8.c.4 13 Eliz.c.7. [b] I Jacob. Sef. I.c.15.

of Obligations.

TIT. XIIII.

[a Brac.l.3. tr.I.c.I. (b)-Id. ib.n. 2.

[c] id.ib. c.2.n.

[d] mest. symb. 1.1. Sect. 156:&c

[e] 1 E:1 Stat: 1: 38 E: 3: c:4 New book of Ent: Action fur pe Statute: Flet: :6:c:64:

Actions: (a) now an Action comes from precedent Obligations, as a Child from a Mother, (b) an Obligation is a legall Bond of tie, whereby we are necessarily bound to the giving or doing of any thing. (c)

All civill Obligations may be divided into two kinds, Obligations by the Common Law, and by Statute. The Example of the former, is that which vulgarly we call a penall Obligation, &c. and of the later, that which we term a Statute Merchant, or what ever else takes its Originall from any Statute of this Common-wealth. (e)

2. An Obligation from a precedent cause, that is either from a Contract, or something of nature, or from a misdemeanour, or something of that nature. There are former Species of obligations by Contract, by a thing done, by words, by writing, by consent.

How an obilgation is contracted by a thing done.

TIT. X V.

A N Obligation is contracted by a thing done, as by mutuall giving, which confifts in weight, number, and measure, in weight, as in things which are weighed, as Braffe, Silver, Gold. In number, as in Money numbred. In measure, as in Wine, Oyl, Corn: now these things which being weighed, numbred, or measured, are given to this end, that the receiver hath immediately a propriety in them, make a mutuall Contract, that being properly mutuall, which Ex meo, becomes Tuum, and when things of another nature are rendred to the Creditor, a Glant: 10: and not of the same. (a)

It a man by Error payes money to another to whom it is not due, he shall recover it again by his Action upon the Case, and he who took what was not due, is obliged. (b)

2. He to whom any thing is given for him by Inlit: this to make use of, is obliged in the thing lent, Title, Sell, I, but there is a great difference between a thing mutuall given, and a thing lent, for he that receives a thing lent is bound to make restitution in Specie, or to the value, if accidentally it happen to be lost or consumed.

M 4 med

[a] Glan:l: 10: c:3:Bra: l: 3. tr: 1: c:2, New book En: Debt.in Approm. 1,2,3, Flet, l,2 36, b] In lit: this

med, by fire, ruine, shipwrack, Theires the incursions of enemies, or lost any other way: Nor isit sussicient, that he keep the with the fame care and diligence as hisom if any other person could possibly have m ferved it with more fafety, but no man is of liged against a greater force or casuall and dent, unlesse they happen by his own neg gence; as if one take a thing lent, home with him, himself being to go travell, and the chanceth to be lost by the Incursion of can mies, robbers, or by Shipwrack: there is a doubt, but in this Case he is bound to ret tution. (c)

(c Brac.ib. Brit. c. 28.

Gland 10: c.3.F.n.b.121. B.Dr. & Sin. 1.2.0.56.

(d) Brac.ib. Glan. 30.

Flet .c.13.1b. (e) Brac.ib. Terms v. Gar-

ni hment . Dr . Stud. 1.2'.24. and 38.D.or Ent. Action fur

le Cafe. Garder. & Hofler, and Gager delive-

vance.V.n.b. 66 63.

(1) Coo.1.4.

3. Now a thing that is lent is given a commodum, and is properly called Rescan modata, there being no reward given for is 1.2c. 138. Flet. use by way of hire, and whatsoever is less, ought to be lent gratis, for when any rewall interveneth, it is rather a locution of put ting to hire, then a lending. (d)

4. He also with whom a man intrusts and thing is obliged, & bound to restore it, as all if he have committed any fraud or deceit is relation to it, but he is not obliged under the notion of a fault, as for carelesnesse and negligence, for that who foever commits any thing to a negligent friend, it is to be in puted to his own folly, but this Law feems now changed, unlesse he that received the thing in trust, promifeth expressely to keep it as his own. (f)

5. A Creditor, who receives a Pledge,0 Pawn is also obliged, and bound to restore it Southcots Case and of such things are given for the conver niency.

niency of both, viz. by the Debtor for to [g] Brac.ib. procure the money to be lent him, and to the Glan. ib. F.n.b. Creditor for his fecurity, it is sufficient to 86 C.boo. Ent. keep it with a due care, which if he shall Action fur le perform, and accidentally loofe the thing be- Cafe Gage I. fore the debtor render the money, he is fe- and Termes v. cured, nor shall he be hindered from recove- Mortgage. Flet. ring his Debt, (g) now we call that a due 1.2,0,56. care and diligence, which a man hath to- [h] coo 1.4. ward his own Goods. (b)

Southcots Cafe.

Of obligations by words.

TIT. XVI.

Verbal Obligation is contracted or Amade by Covenant, now a Covenant is a certain conception of words which confift of Question and answer, as if it be faid, dost thou promise ? I do promise. Wilt thou [a] Brac.ib. n. give ? I will give. Wilt thou do it ? I will 2. Brit.c. 28. do it. Wilt thou ingage? I will ingage. (a) Flet. 1,2,0,56.

1. Every Covenant is either pure or limited to a day, or conditionall. Pure; as where it is faid, dost thou promise to pay so much money without adding any day or condition, in which case the money may be demanded immediately, but if there be a day added when it ought to be paid, it is immediately due, but cannot be demanded before the day, nor upon the day, because the whole day is left to the discretion of the Debtor,

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Debtor, (b) nor is it certain that it will not be paid that day, before the day be past, nor can any one in likemanner demand if one promised to pay this yeare, or this moneth, and before every part of the year or moneth be

[c] Brac. and before ev Bitt. ib. paft. (c)

2. A Covenant is made sometimes conditionally, as if it were said, if A, be made Alderman, dost thou promise to pay so much; where observe, that in this which is conditionall, there is only hope, and expectation, and conditions which relate either to time past or present, do either totally adnull the Obligation, or else not at all differ it, as if

(d) Brac.ib.n.3. a promise be made to pay so much, if A. were Brit.ib. Flet. ib. living, or be now living, for if he neither Dr. and Stu.l.2. were living, nor yet is living, the promise is void, because those things which in na(c) Brac.ib.n.4. ture are now certain, do not vitiate an ObFlet. ib. ligation by their being incertain as to

[f]Dr. & Stu. us. (d).

Ig]F.n.b.fo.

welt. 1.2. Con-

tracts. Sect. 3.

See Dier fo.90.

n.8.6 fo.336.

119.G.

Things to be done, may also be resolved into promises, as a promise to do a thing, or not to do a thing, in which Case it is best to add a penalty because of incertainty, or least the Actor be forced to prove the value, now a penalty is thus added, if this be not done, then thou promises to pay so much, Nomine pene. (e)

h F. n.b.fo. 120.

A. But it is to be observed, that this verK.and 112 H. ball Obligation is called a simple contract, (f)
Bro. Con racts 5 by our Authors, who weigh that which is done
Dier 272. n.31. (g) more strictly then the definitions of things
32, and fo. 296. and that they do not bind, unlesse there be as
n.22.

consideration, or a quid pro quo, (b) 25
where

here a promise is the occasion, that any one [i] Dr. and Stuoth hat which otherwise he is not obliged 1.2.0,20,60 24. nto. (i) [k] Dier, fo.23.

A Covenant in the Civill law is perpe-n.142.

mall, but with us a Contract, though in [1] Flet.1.2.c.6.

miting doth not oblige the Heires, Execu-Bro. Garranty

ors, or Successors, (k) without which they be 89. Coo.1.2.

pecially named, or that the King be Cre-cromwells Case.

itor. [1] Nor doth it work anything, as to Plow.457. Dier

mmoveables, [m] much lesse therefore will 14.n.67. and f.

in Action lie against Heirs or Executors, 42.n.12.

upon a verball contract.

[m] Plow.ib.?

6. VVe do seldome contract upon a bare promise, especially in things of consequence, [n] B10. Legabecause it is often made void by a wager in ger throughout.

Law.(n)

Of the two parties in a Covenant and Promise.

TIT. XVII.

There may be two parts, covenanting in our Law also, and in this case either of them may release, and the Survivor may claim the whole, if it be unpaid, [a] but there [a] Bro. Executare more frequently two or more in a Promise ters 149, there being scarce any one at this time who will lend any considerable Summe to one alone.

vh

Of the Covenants of Servants

TIT. XVIII.

Servants also with us may covenant in the Sperson or stead of their Lords, to whom the Fee and other things which they shall be due to

(a) Dr. and Stu. purchase, shall be due. [a]

The Division of Covenants.

TIT. XIX.

A fent, Judiciallis that which is by command of a Judge, the other is by the confent of both parties, without command of any Judge. (a)

(a) Brac.1.3. tr.1.c.2.n.6. F. n.b.f.123. C.and D.

Of void and unprofitable Covenants.

TIT. XX.

(a) Brac.ib.n.5 If a man promiseth to give a thing which Flet. 1.2.6.60. fibly, it is [a] void, so if one promise that which is

not any ones particularly, as a thing facted [b] Brac.ib.
r publick. (b)

2. So he that promifeth another man,

thing, is not obliged. (c)

3. If one covenants for another, then d Brac.ib.

or him whose Villain he is, it worketh Brit.c.28.

4. He who answers not according to denand, nor according to what he is asked, as if one covenant to pay me tenne bounds, and another promiseth five pounds,

or if one covenant absolutely, and another conditionally) makes his covenant nothing. (e [c] Brac: ib:n:

5. Nor are Covenants or promises 4. Flet. ib,

worth any thing, being made with or to them, who are under our power. (f)

6. He that is mute can neither Covenant (g) Braz.l.3.

nor promile, fince he cannot speak nor ut-tr, 1, c, 2, n.8.

ter words congruous to a Covenant, which is Brit.c. 28. Flet.

alwayes received as to those who are deaf, ib.

because he who covenants ought to hear the (h) Brac.ib.

words of him that promiseth, and he that Brit. ib. Per
promiseth of him that covenanteth, unless kins, 3,4,5.

It may be done, by signes or writing, nor is Coo.l.4. Be
this spoken of those who hear with distinculty, verseys Case. f.

but of those who hear not at all. (g)

123.

7. A mad man cannot covenant, nor indeed [i] Brac. Brit.

do any thing, because he doth not understand and Perk. ib.
what he doth. (b)

(k) Id. ib. and

8. Whatever also is covenanted with a Monk Perk. 722.735. (i) feme covert, (k) or servant (l) in and for (l) Broo. Gon-their own persons, is invalid, as also by him trafts 40. who is condemned of selony, as far as it re- (m) Perk. 26, dounds to the prejudice of the King, or 27. &c.

Lord. [m] 9. Those

n Brit ib. Perk. 16. 19.Fulb. paral.c.bargainesto. 15. o Perk.18. P Fulb.ib.Flet. 1.3.c.7.Plow. fo.19.

q Braft. ib.5. Erit. ib. rPlom fo. 364.

s Bract and Brit.ib Flet.1. 2.c.56 Dyer.fo. 169.7.1. ib.

9. Those Covenants and bargaines which are extorted by force and fear are invalid as if any one by reason if Durefle of lmin fonment promifeth or granteth any thingh word or writing (n) which is fo to be under food if the pact or agreement do at all relate to the thing for which the party is impile ned, (0) fo if any one threaten to kill, in prison, or bear me, if I do but give or fel him fuch a thing, it makes the gift invalid unleffe the fear be leffe then usually happens to a resolved man. (p)

10. So neither can an Infant, or he thatis next to an Infant, and who differs not mud from a madman, Covenant, unleffe it befor his own benefit: And by the Authority of his Guardian, (q) yet in some cases an la-

fant is bound. (r)

II. A Covenant is made also invalid, by a condition which is naturally impossible; is if the Covenant be to give me fo much il touch heaven with my finger, (s) but if it were conditionally I did not touch Heaven with my finger, that were good, and becomming absolute and pure, and the Money may k t Braff, Fle, immediately demanded. (1)

> 12. A Covenant is unprofitable also, if it be to pay so much to day, in case such a ship shall come from Afia to morrow, yet although it is preposterous, it shall not be rejected,

(11)

13. But that Covenants, and Obligation ons may be in writing it is evident ; for if it be written in an Intrument, that a man promifeth,

u Idemib.

miseth, it is so to be construed, as if it were

in answer to a preceding question. (w)

14. It where many things are reduced into a covenant, the Obligor promifeth fimply; fo I promise to give: He is obliged to all; and if he promifeth one thing folely of many or some certain things, the Obligation is contracted into those to which he answereth, x Bratt, ib.n.s

15. But there are such Covenants and Obligations at this day found out for this purpole, that every one may have and affure to himself his own Interest, if there be any thing done against it which is mentioned in the Covenant, and if the thing mentioned be given to another, yet notwithstanding the Covenanter shall have his interest, because the Obligor is bound to the interest, or to the y Brast ib.n.9. penalty, if there be any, (y)

16. If any one Covenants with another, 2.6,20 and 11 himself being interested, it seemes that he is pleased; the Covenant shall be good, as if a Guardian Covenant with his Ward. (2)

17. It is to no purpole for any one to Covenant, that that whichers his own shall be his own in the same manner and form as it is his, for that which is once mine by one cause, and from one, during my possession, cannot be mine again by the same cause, and from another.

18. If the Covenanter thinkerh and suppofeth one thing and the Obliger another, the a Brac.ib.n 4. Covenant is no more valid then if there had Fleta ib. been no answer at all to the question. (a)

19. Nor is it valid if any one covenanteth with

w Bract.ib.n.8. Fler.ib.

Flet.ib.

Dr. and Stu.l.

Z Bracib.

Institutes of the

with thee to commit an Homicide or Felony, &c. For thou shalt not by this be obliged (b)

bBrat.andBrit. and Fleta, ib. Perk.723. c Bro.conditi. 45.85.Cromp. Junifd.fo.10.

Dyer fo, 118,n. 1.and fo.34.n.

33. dPlow.fo.63.

e Coo.l 2.case; Crom.fo.78. and 79.

t Bro.obligat.

g Bratt.ib.n.
2. Bri.ib.Coo.l.
3. Butters case
fo. 28.60 c. Futb
para.c. Barg.
fo. 14.A.

of a Goale or Prison, that a Prisoner upon Execution shall not escape or break Prison, for wee suppose this to be against common Right and Law, which wills that men imprisoned for debt should be kept more strictly, that they may more willingly and readily endeavour to satisfic their Creditors, (e) which seems true in all cases, where the Prisoners not baile-able. (d)

Condition, and dies before the Condition be performed, though the Condition be yet in being, yet our Law doth not give any Action

to an Heir or against an Heir. (e)

22. If there be any day of payment mentioned which will never come, as Doomesday, &c. it is immediately due, (f) a Covenant for the person of a man or for an Estate is good. But the thing so mentioned in the Covenant cannot be demanded, before so much time be past, as wherein it may conveniently be delivered.

23. It doth not feem that one can well be covenanted with by a Body politick, because they obleige themselves to nothing, save under their common seal, [g] but if one buyeth any thing which is converted into the use of a Body politick, the whole Body seems

h Broo. Corpo. to be bound. (b)

Of Sureties or Pledges.

TIT. XXI.

TE, whom the Civill Law calls Fide ju-I for, we call Plegius or Surety, when ny thing is lent to another it is used to be oneby the giving of furety, in which cafe the principall Debtor faile, so that he is [a] Glan.l. 10. nable to pay, then we have recourse to the c. 3.

areties (a) and not before [b]

1. Now Sureties, if there be many, are e- Flet.ib.F.N.B. ery one obliged in the whole, unlesse it be 137.F. therwise covenanted, when they become ledges, and that satisfaction was to be requied from them altogether, fo that if many retys were given, and some or more of them ccame infolvent, the whole burden of acuitting belongs to the rest either for the [c] Gla.l.10:c. hole, or for so much as they have made deault. (c)

3. But if in case of giving sureties, some ureties do oblige particulerly, for certain arts, as for what thall happen as to those articulers whereto they oblige, they are or responsible for any more then those par-

iculers to which they do obleige. (d) 3. Now if fureties happen to be fued brough default of their Principalls, and be ompelled to make payment, they may have heir Action, against him (e) that was princiall.

[b]|Brit.ib.

5.F.N.B.111.

[d] Glan.ib. [e] n.Bo.entr. Pledges, 2.F: N.B.fo.137. 1. and 146.B. Flet.1.2.6.63:

Of obilgations by writing.

TIT. XXII:

One writes that he oweth another, a is indebted to another, he is obliged by writing, whether the Money be numbred nor, nor can be except against the writing that the Money is not numbred, because hath in writing acknowledged himself is debted. (a)

2 Glanif:10:c.
12:Braff:l:3:
tr:1:c:2:n,9:
Brit:c:28:Flet:
l:2:c,55.
bPlow:fo:308:

c F:N.B:fo:
121:Bro:Obligat:21:
d Bro:ib:23:
Fulb:c.Borrowing fo: 52.
Dier, fo: 21:n:
131.
c Dier, fo:51:
n:12:

nature and more binding with us then Companies; for in these there needs no consideration to be expressed, (b) if in any case the be a verball Contract which is afterward reduced into an Obligation in writing, the former Contract is wholly extinct, not with there arise any Action from it, but the Bost only remaines in force, (c) which not with standing, in case of Debt upon record, another former Obligation in writing is therwise; (d) nor is an Obligation in writing made void or discharged by any verball position of not requiring the Money. (e)

2. Now of this there are two forts: the first, is called simple, or fingle, whereinthe Obligor or Debtor only acknowlegeth to Debt, and promiseth payment: the other Conditional, which obligeth to a greater su

as namely double) with a condition annexd, which freeth from the penalty, provied the principall Debt be paid at a day af-

fened.

3. And this is divided into Conventiofall and Judiciall. Conventionall is that hich by consent of Parties is written and aled, and delivered before private men. The Judiciall is that which is entred into bebre a Judge, or one that is in flead of a udge: Of which fort are Recognisances nd Statutes Merchant, and of the Stale.(f)

4. A Recognisance is an Obligation in Action sur le thing inrolled, or upon Record, teftifying Statut. he Debtor or Recognifor to owe such a sum fmoney to the Creditor or Recognisee, and sacknowledged in a Court of Record, or efore a Judge, or publque Minister authorited to take it. Now these are the Masters of the Chancery, the Justices of either Bench, he Barons of the Exchequer, Justices of the Peace, &c. And those are properly called decognisances, which are not sealed by the Recognisor, but written and enrolled in the Arches and Treasuries of the Court. The power and force of which is fuch, that for non-payment Execution is granted, and the Creditor hath possession given him of all the (g) west. Simb. Charrels of the Recognisor (except his Oxen part 1.1.2. Sec.

and other Instruments necessary for Husban- 149.23.H.8.c. dry) as also of the moity of his Lands untill 6.8 37.H.8.c. the Debt be satisfied. (g)

5. A Statute Merchant is an Obligation berts case, fol. in writing, fealed and enrolled, or upon 11, 12.

(f) N.B. Entr.

9.Coo.l.3.Her-

Record

N 2

Record [as we fay] witnessing the Debtor to owe unto the Creditor fuch a fumme : this acknowledged before fuch persons as area pointed by the Statute : As Clerks, who from their Offices are called Clerks of the Statute Merchant, the Maior, principal Guardian of London, or two Merchants the fame City, especially appointed : Or de the Maior, Recorder, and other fit men of ther Cities or Burroughs which have the power, and they are fealed both with the Seale of the Debtor, and of the King, forth King hath a speciall Seale for this purpole divided into two equall parts, whereof the one which is least is committed to the cast and custody of the Clerk of the Statutts the other to the Maior or Gardian. Theb dy of the Debtor is lyable to be taken upon execution of this Obligation, if he be a Lap man, and can be apprehended : But if he's not, or cannot be taken within 3 moneths to make fatisfaction, his Goods and Lands at

(h) weff.ib.fec, lyable : (h) But if the Debror be in prilon, 151.13.E.1.st. the Creditor must afford him Bread and

3.5.H.4.c.12. Water. (1)

15.

(i) F.N.B. 116 6. A Statute of the Staple is double, and O. & 133. C. properly so called, the other improperly. 13. E.1. Stat. That which is properly fo called, is an Obli-3. Broo. Stat. gation inrolled or recorded, which is acknowledged in the presence of the Maior, and of one or two of the Constables, and fealed by him. Now by force of this Obligation, if the Debtor make default in payment, the Creditor by authority of the Prator feileth and detaineth the Body, Lands, and

Goods

Goods of the Debror untill hee be satisfied. provided he be found within the limits of the staple, or that his Goods may be taken. But if neither his Body, nor fushcient of Goods be found there, the Chancellour of England upon Certificate of the bufineffe, uner the Seale of the Maior, decrees further, That both bis Body and Goods, where foever they e found, shall be taken, and his Lands extenled untill satisfaction made. (k)

7. That which is improperly called a Sta- 173.27. Ed. 3. tite of the Staple, is an Obligation acknow- St. 2.c.9. edged before either of the Cheife Justices, Or in their absence, before the Maior of the Staple of westminster, and the Recorder of London, and it hath the same force in Execution as the other: But it is called so improperly, because it is not only used as the other among Merchants, but according to that Example, amongst all the Subjects of England. (1)

8. It hath been often questioned, whether 55. 23. H. 8. that little peice of wood, which wee call a c. 6. Tallie, with an Obligation written upon it, and sealed with the Seal of the Debtor, may be called an Obligation in writing: But because letters written in wood may be easily raced out, and altered, it was resolved unfit to allow and open so apparent a way to de-

ceir. (m) 9. These conventional Obligations ought to be in the first person, those which are in the third being of no force, though some will have these being made amongst Clerks in other Nations beyond Seas valid. (n) 51. 65.

10, Amongst N 3

(k) west.ib.jec.

(1) weft. ib.fec.

(m) Bro.oblig. 80.F.N.B.fol. 121./. (n) 38. E.3.c. 4 Bre. Oblig.

192. 1. 26.

ring, which wee call Faits or Deeds: then are some things so ettentiall, that an Obligation cannot be good without them, other things lesse necessary and essentiall. Of the first sort are writing in Paper or Parchment, Of the second, Inditing and Form: The omission of which doth not invalidate the

(o) Coo. 1. 2. Obligation. (o) Godwards caf. fol. 5. Dyer, fol.

Of Obligations made by Consent.

TIT. XXIII.

Obligations are not only by writing and words, but by Confent; as in Contracts which are bona fide, namely Bargains and Sales, Lendings and Borrowings, Partnerships and Hirings. Wherefore these kind of Obligations are termed Contracts by confent, in regard writing and Presence is not

(a) Gland. 10. alwayes necessary. (a)

tr.1..c2:n.9.

1. Wee must not here omit that our ance tr.1..c2:n.9.

ent Lawyers called those Obligations which were contracted by the Thing, Words, and Writings, or Consent; not so much Contracts, as the compleatings and perfectings of

(b) Brac. 1.3. Joyning; (b) that is, an accumulation of Atr. 1.c. 2. n 1. greements, or adding Agreement to Agreement. Brit c. 28.

ment. (c) For a Contract cannot be without (c) Flet.1.2.c. consent, and therefore possible it was for that 60. realon. The other Formes were rather Ornaments and Compleatings, because the Consent is chiefly materiall, and is in all, as giving being to a Contract, and something more, wherein the Confent is declared and proved.

2. We have spoken sufficiently before of Livery. The joyning which we here intend, is, where many Agreements for one and the fame thing are reduced into one Covenant. For many Agreements and Parts may be reduced into one Covenant, as well as many

things. (d)

the

(d) Brit. ib. Brac.ib.n. II.

Of Bargaine and Sale.

TIT. XXIV.

D Argain and Sale is, where there is an A-Dgreement concerning a price betweene the Contracters, there being something received by the Buyer by way of Earnest, that being an Agreement of the Bargaine and Sale contracted, unleffe there be a day given for payment, in which case it is not necessary. (a) But if there be any Writing (a) Bro. cont. intervening, the Bargain and Sale cannot 15.& Action be perfect, unlesse it be delivered to the sur le cafe, 60. parties, and absolute: And where there is neither writing, intervening, nor any Deli-N A

b Glan l. 10.c. 14. Brac.1.2.c. 27.n.1. Flet 1. 2.6.58.

very followes, they are at liberty, and the Contractors may without penalty recede. (b) But if there be any thing given by way of Earnest before any Delivery, and the Buyer repents of his Bargain, fo that he defires to recede, he shall loofe what he gave : And in case the Vender repents, hee shall make restitution double ; (c) But if the price be paid, or part of it, and Delivery followes, the Bargain and Sale shall be perfect. Nor can either party recede under pretence of

non-payment of the price in part, or in the

whole: But the Vendor may have his Acti-

on, and recover what is wanting of the price,

c Glan. ib. & Brac.ib.n. 2.

d Id. ib.

but not the thing it felf. (d) I. Now it is necessary that the thing sold be certain or reducible to certainty, and a certain price agreed upon : For there can be no Bargain without a price certain. Nor can demand be of a thing uncertain; but if it be agreed between the parties, that there shall be so much paid for the thing bought, as such a one shall value it at, unlesse that party will sell the price : Or in case he resule, or be not able, there shall be no Bargain and Sale, as not having agreed upon any price.

e Brac. ib.n. I. (c) Flet. 1.2.6.5 8.

f Fulb.par.c.

2. And to the making up of a Bargain Dyer, foi. 91. n. and Sale, it feems consistent with our Law, that the price for the thing bought be in money numbred, otherwise it is but a Contract in the nature of an Exchange ; (f) Al-Exch. 32. Perk. though if such things be exchanged as cannot conveniently be transferred without writing. The word Exchange ought necessarily

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to be inferred, to make an Exchange: (g) g Fulb. ib.
And it may be the reason is, because the h Bro. Exch.
word Exchange implies a warranty. (b)
2.12.

3. In a Bargain and Sale before and after Delivery, he who hath the thing runs the hazard of it, unlesse it be otherwise agreed from the beginning; because indeed he who hath not as yet delivered the thing to the Buyer is still reputed Master of it. For by Liveries & Uses the Owner-ship is transferred: For Example, If an Oxe dye before it be delivered, or a House be consumed with Fire, or Land in part or whole be drowned and loft, it seems that all the hazard shall be upon the Vendor. On the contrary, if after Sale, and before Delivery any thing happen to be added to a Fec, the profit shall redound to the Vendor; For the Commodities ought to goe the fame way with the Discommodities, and the profits ought to be his who runnes the hazard and

danger. (i) But there needs no Livery where i Brac. & Glan

Lands are fold by Deed inrolled, (k) or alic- ib.

nated by Exchange.

4. Bargain and Sale may also be contra-Bargain. Dr. ched among some, either Pure or Conditio-Stu.l.i.c.7., nally: As if the Buyer like a thing in a Lit.l.i.c.8.

money, otherwise that it should be restored.

fed. (1)

1 Brac.l. 2.c.

5. But if one buy a thing facred of a Ven- 27.n.2. Flet.l.

dor in regard the Contract cannot stand, the 2.c. 58.

Buyer shall recover as to his Interest against the Vendor, that he be not deceived, although the Buyer be obliged to know what

and

and whose the thing is which hee buyeth, whether facred or not, and whether bound or

not. (m) (m) lidem. ib.

6. But if a Vendor sell any thing for found, and without maime, which afterwards proves maimed and unfound, and that it can be proved by the Buyer to have been so at the

ble, as Land, and in the Sale promifethito be free, when as it is fervile, or dif-ingaged,

8. The Vendor and his Heirs are bound

thing fold, whether it be moveable or in-

time of the Contract made, the Vendor's (n) Glan.1.10. obliged to take it again. But if it were found c. 14. Brac.1.2. and without maim at the fale, the Vendor's c.27 n.2. F.N. not responsible for what shall happen after-E.94. & Dr. & wards. (n)

Stu.1.2.6.42. 7. When any one fells a thing immoves-Flet .. 1.c. 58.

Dyer, fol.75.n. 23.

(o) Fulb. par. Barg. 15. (p) Glan. ib.c.

15. Brac. ib.& 1.5. tr. 4. Dyer, 75.7.23 .Flet.l.

7.6. 38. & 1.6. c. 23.

(q) Fulh. ib. Coo 1.3. Fermurs care, 78. ch 1.4. Nokes cafe, 80.

(r) Dr. & Stu. L. 1 c.8.

(s) 13. H. 4.C. 1. 11.E.4.C.7. 1. R. 9. c. 1. with others.

and not bound, whereas it is bound and ingaged. The Contract is not broken by this, but the Buyer may have his Action against the Vendor for non-performance of promile, which is alike good, if hee assume to make good either for the quantity or quality, and afterwards the contrary befound. (0) to warrant to the Buyer and his Heirs the

moveable. () Though some are of opinon that they are not obliged to warranty by the Law, but in cases expressed by the Law. (4) 9. Things incorporcall cannot with us be fold or bought without writing. (7)

10. Meats which stink, and are putrified, and Commodities which are fallacious are prohibited to be exposed to fale; (s) but these things belong to the publique Law.

11. The property of things alienated in

Fairs,

Fairs, or publique Markets, are altered, unleffe they be the Kings, or that the Contracts be by Covin and Collusion : so that in this case the Buyer is free from all feare of Evidion, (t) provided there be fuch things (t) Dr. & Stu. observed in the buying of Horses as the Law 1.1.6.25.81.2. requires. (u)

12. And laftly, as Actions cannot be gi- (u) Brac. 1.2.c. ven, to neither can they be fold, except it 28. Cromp. Fube to the King, or by the King, (w)

C.47.0 49. riid. 221. Dyer. fol.99.n.66. (w) Plow. 79.

Bro.chofein A-Et1011, 4.

Of Letting and Hiring.

TIT.XXV.

Etting and Hiring is next to Bargaine Land Sale, because as Bargain and Sale is contracted after the price is agreed upon, fo Letting and Hiring is for a fet Hire or Rent: (a) For when a man lets his Estate (a) Glan.l. 10. to another for a certain Term and Rent, the c.19 Brac.l.2. Leslor is bound to give the thing leased for c. 28. (b) Brac.ib. use, and the Lessee to pay his Rent. (b)

I. Rene doth chiefly confift in moneyes Flet.l. 2. c.59. numbred, yet it may also be in Corne, and the like : (c) And sometimes the sole Re- (c) 34. Eliz.c. ward or Hire is in Fealty. (d) But when 11. Land is leafed for Land, this is an Ex- (d) Lit. l.r.c. change. (e)

2. Emphytensis, which the Romans tooke (e) Id. ib. for either Bargain and Sale, or Letting and Hiring promiscuously, wee call Fee-farme,

of which we have spoken enough before. (f) F.N.B.86 3. We also do let and hire Moveables, as D. Bro. Leafes, Horses, Oxen, Sheep, (f) and Immoveables, as Land: (g) So also things incorporeall, as '(g) F. N. B. right of Pasture, (h) Tiths, (i) but those not 146, K. Lit.1, 1, without writing, (4) (unlesse any corporeall thing, as a Church, Churh-yard, Glebe, c. 8. (h) F.N.B. fo. Parlonage houses, &c. be cheifly and parti-86. B. Entries, cularly let; for so under the name of theap-Agiffment. purtinences, Tithes and Oblations paffe like-(i) Terms, v. wise.) (1) So also Services and Labours: (m) but not fafely, as to the quantity, for that (k) Bro. leafe, Errors are cafily this way contracted. 1.5.12.17. 0 4. He who hires Cloaths, Gold, or Silver, 21. 23. H.6.c. or other Ornaments, or Oxen, either giving 10. or promising hire, such a care is required of (1) Byo. leafe, him, as a diligent Master of a Family would 15.20. have; which being had, if the thing by acci-(m) Entries, dent happen to be loft, hee is not bound to Servant. Dr. & make restitution, unlesse it be agreed other-Stu. 1.2.6.38. wife. Nor is it sufficient that he have such a [n] 13.Eliz. care of them as of his own goods. [o] a. 8. 37. H. 8. 5. Letting of Lands and Immoveables is at this day the greatest occasion of suits of all [o] Brac. ib. others, wherefore it is requifite that wee Dr. & Stul. 1. should speak more largely in this place of 6. 23 1. 2.6.4. these particulars. Every one may make a Flet. 1.2.6.5 9. lease of Lands, who holds them in Fee, whe-P 32.H.8.c. ther he have Fee-fimple, or Fee-taile, and whether he be possessed in his own Right, in [9] Lit.1.3.c.3 the Right of his Wife, or of a Church,[9] 1 1 1d. ib.c.5. which is also true in those who hold as Part-[s Bio. leafe, ners: [q] So also Cestuy qui ufe, [r] a body po-32.42. litick may make a leafe, but not without wri-[t] Id. ib. 4. ting. [s] As also he who hath a Free-hold, [t]

or or

or a Leafe, provided he exceed not his term, and Guardians until their Pupils and Wards

come to age.

6. He that hath a Fee-simple in his owne Right, may make a leafe for as many years as he pleaseth, provided it be not to a Body politick, left by exceeding it feem a Demile in Mortmaine. [u] He who hath a Fee-tail in [u] Bro.ib. 47. his owne, or Fee-simple in anothers Right, viz, either in the right of a Church, or of his Wife, is tied a little more strictly, for that they cannot leafe Land by a new leafe which is already let for above the term of a yeare. Nor any which were not usually wont to be let within the space of 20. yeares past, nor thole for a leffe rent then they formerly were let for, or for a longer terme then 21. years, or three lives, and that without permission of waste. To these also may be added, that he who hath a Fee in right of his Wife may let it joyntly with his Wife, but hath no power to alienate the Rent, but it shall come to the right Heir of his wife after her decease. [w] [w] 32.H. 8.c.

7. Arch-bishops & Bishops cannot let the 28. Lands of their Churches for above 21. years, or 3. lives, to be accompted from the beginning of the leafe, nor for lesse Rent then it formerly went for, nor for leife then formerly

[x] I Eliz.not it used to be let for. [x] 8. Masters and Fellowes of Colledges, printed, Dyer, Deans and Chapters, Wardens of Hospitalls, fo. 145.1.65. and all Ecclefiasticall persons are prohibted [y] to let their Church, or Colledge Lands [y] 13. Eliza. for more then 3. lives, or 21. years, to be ac- 10. compted from the beginning of the leafe, nor

[nor this without their private Statutes permit.] Nor so, unlesse the lease which is on foot if there be any be within three years

2 18. Eliz. of expiring. [7

Besides, the Colledges of both Universities, as of Eaton and Winebester, are obliged to

(a) 14.Eliz.c. (a) Yet are they not prohibited from letting freely those Houses which they have in any

City, Burrough, Towne corporate, or publique Market Town, with the Lands belonging to them (provided they exceed not ten Acres) according to the Common Law of England, if it be not contrary to the private

(b) Id. ib. Statutes of their Colledges. (b)

whether a Prebendary of a Cathedrall Church may lawfully let part of his Prebendary, procuring the faid Lease to be confirmed by the Dean and Chapter, without any content of the Bishop, the Bishop being both Patron and Ordinary of every Prebendary: but continuall and daily Custome hath rendred his consent unnecessary and uselesse.

(c) Dyer, fol. 61,n.30.

nake a Leafe for any time longer then they reside there (the liberty of being absent 80. dayes every yeare, being alwayes permitted them) unlesse by the Lawes they are permitted to have two; In which case in regard her

[d] 13. Eliz. cannot possible continually reside at both, he may let one to his Curate. [d]

[e] Lit.1.1.c.6. for the life of the Leffee, [e] or anothers life,

f] or

ffor for more lives, [g] or for terme of [f] Id. ib. years, [b] or lastly for a life : and afterwards [g] Id. ib. that being expired I for a term of years, [i] [h] Id. ib. and that either by writing, or without, [k] [i] Bro.leaf.51. nor by Indenture only but by Deed Pol. () [k] Littleib. 12. But if any one letteth his Landsby 1 F.N. B: 148:

writing or without, not mentioning any tearm but giving the Lettee pollestion, He is prefumed to let them for the life of the

Leffee. (m)

res

fi-

lg.

13. There is no need of giving possession m Lit.1 2:c.l, to a Leslee for years, for he may enter by Plow.152. vertue of his Lease (unlesse besides the Lease there be a Grant of a Remainder to another for life, or in fee in the same Deed (n) for if a man makes a Lease of lands for years, though he were Leslee before, yet he dorn rightly take n Lit.1.1:0.7. possession of the faid Lands by this means. (0)

14. Lessor is bound to warranty to the Les- o Id:ib: lee; for the Leffee being ejected before the terme ended may have his Action of Covenant against the Lessor, (p) and that whether hebe diffeised by the Lessor himself or by a P F:N:B:fo: more ancient Title, nor only he, but his Af- 145: M:Dier

fignee. (q)

15. But if a third person eject him against 9 Id.ib: Right, he shall recover damages against the Ejector (r) unlesse the Lessor agreed by Indenture, that in ease the Leslee were ejected r Id:ib: he should have his action of Covenant as Idaid: gainft him. (s)

16. Lese for life by Indenture, in regard he hath a Free-hold, thall not have an action of Covenant against the Lessor, in case hee-

328:2:8:

[Id.ib.

ject him before his tearm ended, but an Af.

fife.(t)

17. Where a Lease is but for a year, and so from year to year, the Leffor cannot eject the Leffee at the end of the Tearm, nor can the Leffee go out against the will of the Leffer, For wholoever of them would recede from

the agreement, ought to give the other waru Bro.leafe 13. 22.

ning, (#)

18. Leffor cannot remove his Tenanta Will, so as to hinder him from taking the profits of his Seed or Corn fowen, or without granting him convenient time to remove his Houthold stuff, because the time is well enough force-feen and known to him, (w)

19. All perfons may regularly take formes, except spiratuall, who are prohibited, unlesse it be for the maintenance of their Families,

(x)

20. Leffee is obliged to pay his Rent to the Lettor, which if he thall faile to do; the Letfor during the Terme may distrain, and this [9]Dr.Stu.l.2. feems true, whether it be agreed fo or not: e,9. Lit.ib. Brac For whatfoever is brought by the Lellee into the Tenement is annexed as a pledge for the Rent, (y) but after the tearm he cannot, (3) the payment of Rent admits no fatisfaction, for the Leffee is not freed by paying before the day. (a)

> If Tenant of a Fee-farm doth not occupy the Land leafed for the space of two years, by reason whereof where can be no distresse, the Lessor upon his Action may recover it

into his own hands. (b)

[w]Lit.ib.

[3]21.H.8.6. 13.

L.s.c. 28.n.1. Z Lit.l. I.c. 5 .Flet.1.2.c. a Coo. Bevills cafe,fo.10.4

b 6 E.Y.C.4. Weftm. 2. c. 21. F:N:B:fo:209:

22 But

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12. Bur in most Leases whether for years, life, it is covenanted, that in case the ent be behinde at a certain day yearly. half yearly, unpaid, that the Leffor may nter & reassume the possession to himself, or, at the Leafe shall forthwith become void dexpire. In the first case, if the Rent at e day affigued be not paied; being lawfuldemanded, upon the ground, by the Lefr, not only he in his life time but after his eath (unlefie he distrained in his life time rthe Rent, or received it upon tender (c) Heir may enter; otherwise not, (d) for c Coo.!.3.Penent ought to be demanded, (e) nor in this nants cafe. he doth the day demand for the man, but d Dr. Stu,l. I. the condition be that the Rent shall be c.20. Dier fo. aid in any extrinsecall place, there needs 51.7.17. o demand, according to the opinion of c Perk. 836: me, (f) though others more modern affirm f Dier 1.8.n. e contrary. (g)

23. If Husband and Wife hire land at too 8 Coo.l.4. Burcere a Rent, the Husband dying before the roughes cafe farm, the Wife may leave it, and if the Huf- fo.73 and survive the wife and dye, his Execuors have the same liberty. If the Testotors foods are not sufficient to satisfy the other creditors (the Rent being computed for

c tearm of years. (b) 24. If a man make a Leafe for a year, upon 6.33. Dier fo. condition that the Rent shall be paid at lichaellmas, and in the mean time give a enerall release to the Lessee of all Actions nd Demands: this doth not remit the rent although it feems fomething strange.

15. A Leffee is not only bound to the payment 23.24.

h Dr.Stu.l.z. 146.7.70.

i Lit.1,3.0,8.

k Dier .fo:4,n: 1 Id.fo.324.n, 34> m 6 E:1,0,5, Dier, fo, 90, n, y, and 10, and fo,108,n,31, and fo: 198, n: 43. n Dr. Stull 79 c,31, and 1,2, C,4, 0 1d,l,1,c, 17, P Idab, q Dier, fo,65, n,8,

ment of Rent, (4) but also to use well the thing lealed: (1) fo that if either he, or a thin person commits Waste, he is liable unto Leffor according to the penalty of the Sta tute, (m) and is left to take his remedys gainst the third person, (n) unleife he ben Infant ; (0) but it is not waste, to fell timbe for necessary reapartions. (p)

26. In felling and hiring, the Lawish fame as to the mutual obligation of perform as in Covenants. And therefore if the Lefter undertakes for himself to do, or not do m thing, his Executors or Affignes not being named, himself is only bound, and they free from any manner of Obligation; (1) butthis is sometimes disputable : A Lettee covenant with his Leffor, that if either he, his Exe curors, or Assignes, alienate the Lands la fed to another, that then it shall be lawfull for the Leslor or his Heires to re-enter, and to eject the Leffee, his Executors or Affign; and not long after the Leffee falls fick, and by his last will constitutes his wafe his Execu trix, and dies; the wife marryes a fecond his band who alienates her right, and tearma the faid Lands; and it was much questioned, whether in this case the Leslor may enteria regard this fecond Husband was neither Exe curor nor Affignee of the first. But in thetal it was determined for the Leflor, becaulette second Husband was in this case adjudged r Dier, fo, 6,n, Affignee in Law though not in fact. (r)

27. If a Leslee oblige himself to leave how fes in repaire at the end of his tearm, the Lefor cannot bring his action of Covenant in-

fill the Term be ended, although the Leffee [8] F.n.b.fo.

should pull the houses down, yet he may 145.K.

tring an Action of waste.(s)

(t) Dr. & Stv.

18. Lesse is not obliged against a greater 1.2.c.4. Dier so. force, or against rempetts, or incursions of e-33.n.10,11.

nemies, unlesse he do expressy oblige himself so.36.n.35.so. to it.(1)

29. Tenant at will is not bound to repara- 8. fo. 1. b.v. Lm. rations as Tenant for years; (u) but if he l. 1. c. 8. commits waste, he is liable to an Action of (w)id.ib.Dier Trespalle. (w)

fo. 90 n. 9, 10.

Of Partners or Fellowship

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TIT. XXVI.

Our judicious Lawyers are very frequent in disputing the Rights of those partners or fellows, who hold Lands or other things pro indiviso; and these they call either Partners, joint-tenants, or Tenants in Common. (4)

L. Partners are either by the Law, or by Cu
[a] Little.l.3.

L. Partners are either by the Law, or by Cu
[a.2,3,4.

from by law, (b) & two or more women of the [b] Termes.

[ame degree, who for defect of Heires Males v. Parceners & faceed by equall Right in the inheritance Little.ib.

[at their Ancestors, or else the sons of two women to whom Lands not formerly divided by their mothers, descend (c) by Custome, are [c] Little.l.3.

[at their Ancestors of two women to whom Lands not formerly divided by their mothers, descend (c) by Custome, are [c] Little.l.3.

[at their Ancestors of two women to whom Lands not formerly divided by their mothers, descend (c) by Custome, are [c] Little.l.3.

[at their Ancestors of two women to whom Lands not formerly divided by their mothers, descend (c) by Custome, are [c] Little.l.3.

Institutes of the

brothers, (or for default of them) fifters, N.i. ces or Aunts.

e Instit. Jur. Com.c.15. Dier fo.67.n.18. & fo.160.n.43.

2. Joint-tenant are either called so properly, or improperly, (e) properly are those who hold a Fee, or Freehold or any real Chartell by force of the same Title, pro indviso, improperly are those which policite any personall Chartell so, and those are thus in the impropers of the same will solely; a purchasing the Premises with their own monies, and so possessing them pro, indiviso, a else by the will and bounty of others, as when one gives any thing to two or more in intly, in unlesses the Donecs be a Body Politick, and receive under that notion, or at least one of them, in which case they are tenants in Common. (g)

f Lit. 1. 3.c.4. g.Id.ibid.

3. Partners and joint-tenants differ two wayes, the former being joyned by necessity, and are called Partners meerly in respect of their inheritance: Joint-tenants have their name either from purchase or Gift, and are joyned together by their own Wills, and not by necessity. (b)

h See the former quotations

4. There are also some, who are Joint-tenants only for life, and yet have severall inheritances: as where Lands are given to two men, or two women, and to the Heirs of their bodies, in this Case so long as they live, they are called Joint-tenants, for one of them having Issue, and dying, his fellow shall have the whole during his life, who also is he shall leave Issue and die, his Heir with the Heir of him that died before, shall hold the said Lands in common, (i) and if one

i Infl.c.15.

brothers

of the Donees die without Heire, his part for defect of an Heire, shall after the death of his fellow revert to the Donor. (4.

1. Tenants in common are they who hold the same thing, as Lands or Tenements, Chattells personall or reall, jointly, but by severall Titles, (1) for if one parcener alienate or give his Right to a stranger, the stranger and the rest are Tenants in Common, though the rest amongst themselves en-

loy their former appellation.

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6. Wherefore Tenants in Common differ from partners in this, that thefe do not pollefle any thing in Common by Right of inheritance, as do the others; nor are they ioyned by any necessity, and from Joint-tenant, in that they hold a thing in Common by divers Titles, or at least the Tenants are naturally fo unequall, that they cannot admit of any coniunction; fuch are bodies politick among themselves, or with single persons. (m)

7. First for partners, these though they die before Partition, transmit and leave their part to their children if they have any, otherwise to the rest of their fellows. (n)

8. Partition may be made, either by mutuall consent, (o) or (if some refuse) by the power of the Judge, for he who defireth n 43. to have his part divided, may have a Writ of Partition, by which he shall compell the rest to divide, (p) but if one woman Partner en- P.F.n.b. 61.K. termarry, and having Islue dieth, the Hus- & 259. C.260. band being Tenant by the courtesse, may B 261.C.
compell them to a Partition, if it be not al. q Littl.1.3.c.2. ready made. (q)

k Littl.1.3.c. 3

I Id ibid. c.4.

m Id ibid.

n Id.ibid.c.z. Inf. c. 14. o Dier fo.179.

9. Littleton doth very fully describe the manner of making Partition, both by consent and compulsion, but this is rather manter of fact then of Law; that onely is observable, that if Partition be made by consent one or more of the Partners being under age, it may afterwards be corrected what they come to full age, provided they do not confirm it when they come of age by receiving the profits: (r) and if it be a Fee-Tail, at though all be at age at the time of the Partition made, yet their Heirs may disagree to a left fo also, if an unequal Partition be made by the Husband of co-Heirs after Matrimon, is dissolved, either of them may disagree. (for the street of them may disagree, (for the street of them may disagree, (for the street of the street of

the Partners Estate lye evicted by Law, Heather whose partit was, may compell the rest a new Partition, and recover a lawfull part

in those Lands which the rest hold. (u)

heritance, and the Partners will not consent in the Presentation of a Clerk, then the eldest shall present in the first vacancy, and the rest according to their Case: and to this they may be compelled, if they result to a gree, and every one hath their lawfull remedy, if they be hindred from presenting in

their turn. (w)

12. If there be two Joint-tenants of a Fee fimple within a Burrough, where Lands and Tenemenrs are divisible by Will, and one of them devises his Right to a stranger, and dies, this Devise is void, and the reason is, because that part which by the Law at his death

(r)Id ib.

[s]idib. [t]Id.ib.F.n.b. 62 E.

n Little.ib.c.2.

[w]F.n.b.34: T:and 36:C. ath comes unto the other by the Right of crease, and out of Descent cannot any way conveighed to another by a Will (which tes not its Operation till the Death the Testator) from him that claims the [x] Littl:1:3:

tole. (x)

13. Two take a Lease joyntly for years th this condition agreed to between the effor and them, that if the Leffees die bere the Terme ended, the Lease shall be bid. The Leslees make Division : and one them alienareth his part, and dies, the e Lessor cannot reassume the part of him hat died, but the Alienee shall hold it duing the life of him that surviveth : nor hath ccupation in this Case any force; but if two ke a Lease for theit lives, and make par-[y]Dierfo:67.

tion, either of them dying, his part imme- c:18: listely reverts to the Leffor. (y)

14. Two are Joint-tenants for life, one of which lets out his part by Indenture to a hird person for years, reserving a Rent from it to him and his Heirs, and dies, the question is, whether by his death the ritle did wholly vanish, or whether the surviving jointtenant ought to hold the whole for his life;& if he ought, then whether he were left to his orn libertty, notwirstanding the Lease of his fellow, or to take onely the Rent referved upon that moity, and it was adjudged by the Justices, that the surviver ought to hold the whole Lands for life, and that free and dif- [z Id:fo:178 obliged from the others Lease. (2)

15. And this is the difference between Jointtenants in Fee, and Partners, that neither

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of the Donees can charge his Lands which he holds, pro Indiviso, with any Rent long then for life, but a Partner may, and then son is, it cannot prejudice his fellow or heir, who derives his Right not from his but from the Donor, but Partners succeeding one the other for defect of Heires, may from another derive their Right. (a)

[a] Littl.ib.c.3.

16. Which notwitstanding in letting clearly otherwise, for if one of the Done who nolds, pro Indiviso, to him and his Hein let out his Right for a compleat Term, and dies, the Lessee after his death may retain during the Term, nay he may enter into the Lands, a though they were not delivered unto him in the Lessors life time, or an wayes possessed by him. (b) and the reason diversity between a Rent Charge, and a Lesse is iudiciously given by Littleton, (c) which leave to be considered by the studious.

17. If there be two Joint-tenants of a silva cadaa, and either of them, the Wood being fold, retain the whole money to himfelf, his fellow can have no Action against him, (d) nor could Joint-tenants or Tenants in Common formerly be forced to make Partition, (e) unlesse it were by the Custome of the place, (f) but this is otherwise at present, (g) and yet Joint-tenant, of Tenant in Common being eiceted by their fellow, may have an Action of forcible Entry against him.

in by divers. Titles, if they be eiected by a stranger, must bring their Actions severally,

(b) Id.ib.

Dr.Stu.l.1.
c.14.
(c) Little.ib.
[f F.n.b.62.C.
[g] 31 H.8.c.1
32 H.8.c.32.

whic

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which in Joint-tenants is otherwise, (b) yet [h] Little.ib. Tenant in Common may sue iointly for a [i] Bro. Tething which cannot be divided. (i)

nants in com.

who hold chattells reall, and those who hold chattells personall in common, that they being eiected by their fellow, may have an Eiectione summe, or an Eiectione custodia terrarum, as their case requires, but the other cannot, but are lest to take them themselves, when opportunity happens. (k)

or personall may leave their part to their Ex-

at. If two possesses Goods in common, and 118 H.
one of them deliver them to a third person,

he onely may have his Action of account against the detainer, and not his fellow. (m) [m] Id. ib.

loint-tenants, and Tenants in common, that they must bear an equal burden for that which they possessed in common, for if one or more refuse to contribute, the rest may

bring their Actions against the refusers. (n) [n]Id. 162 &

nure in Common with us, which comes either [o] common in by reason of agreement, (o) or of Tene-Grosse.

ments amongst those of the same Fee, (p) or [p] common aplometimes of divers, (q) for in many Man-pendant, or apnors, the Lord hath spacious and large purtinent.

grounds, in which every Tenant according [q common by to the rate of his Tenement, hath a Right reason of vicion of pasture, or of digging Turf. But in regard nage. Dier so these kind of grounds for the conveniency 47.n.12,13.

of the Common-wealth, cannot admit of

Partition,

Partition, Every one who hath such a Right in them may, (if through covetousnesse they put in too great a number of Cattel) be recalled to just and equall bounds. (r)

(r)F.n.b.f.125

Of Commandements and At-

TIT. XXVII.

(a)F.n.b.121. (b) Glan l. II. Brit.c.28.New Book of Ent. Account, Attorn Commandment, Terms of the law, v. Account Dr. Stu.l.2. c.24. Flet .l.2. C,71, 72. [c Brit 0,28. Flet.1.6.c.27. d Brac J.A.tr. I. 6.10.26,27. c]Plom. 189. 290. (f)Flet.1.3.c.15 [2] Perk. 188: Fulb.Par. c, Contracts, fo.

Plow.fo.14.

A Command may with us, as with the Civil Law be contracted fix manner of wayes, viz. by the sole cause of the Commander, (s) or of the Commander, and the party commanded, or of a third person, or of the Commander, and a third person, or of him that is commanded, & a third person, or lastly of the commander or master, the party commanded or servant, and a third person Examples might be easily given, but mens endeavors are not alwayes accepted, and therefore this command is not much in use with us, wherefore these are to be implied from the Examples of letting, and other Contracts. (b)

1. The Servant cannot have his Action against his Master for commanding him any thing uniust, (c) but a third person may if the command bring him any prejudice, (d) for that the Law supposeth the Act of the Servant to be the Act of the Master. (e)

2. There is nothing hinders with us, but that a command may be deferred untill a

day,

Lames of England.

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ay, or be done upon condition, and is ringuished either by the death of the Mater or Servant, (f)

f Flet. 1.3.c.

3. The ends of a Command are diligent- 15. y to be looked after, and observed, and cept. (e)

g Perk. 118. Fulb. pural. c. Contracts, fol. 3.Plow. fo. 14.

of Obligations which arise from implyed Contracts.

TIT. XXVIII.

Bligations by our Law arise from implyed Contracts many wayes: As for transacting businesse Tutelary, dividing of Common. But as for the transacting of bufinesse, and the like: (a) that which is done a Dr. Stu.l.2. by the command, or for the fake of one that c. \$ 1. Brac. 1.3. is absent [if Lawyers have informed mee a- tr.1,6,2,2,10. tight, I is rather left to the conscience and Flet. 1.2.6 60. integrity of him whose businesse it is, then to an Action to be satisfied. Nay (which is more to be admired) it oft happens, that for doing well a man may incurre the guilt of a Trespasse: As if hee drive his Neighbours Cattell-out of anothers Corne, or carry Tithes exposed to Cattell into the Parlons Barne. (b) b Dyer, fo.36.

1. Gardians may lue the debtors of their n. 38, 39. Pupils: And the Guardianship being ended, is they are lyable to render accompts, so may hey claim the Expences which they were

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at , by reason of their Office , of their Pu

(c) F. N.B. fel. pils. (c)

2. A Donce also who sues a Donce for 118.B. Terms. v. Gardain in the partition of a thing given joyntly to focage, Flet, I. both; and a Partner who brings a Wind partition against his fellows, may be referred 3.6.15.

(d) Flet, 1.2.c. hither. (d)

3. Furthermore Executors may fue the 60. Debtors of their Testarors, and may be for ed by the Creditors and Legatees, (e) which (c) Id.fo. 119. is true also in the Administrators of those M.121.0.145 who dye intestate : (f) And in these succes-D.H. fions also, whole Predecellors owed money, (f) Id. fo. 120. or had moneys owing to them in the name of their Abbies : (g) And in the Husband, (g) Id.fo. 121. whose Wife was indebted before Marriage, K. O 122. E.

or had money owing unto her. (b) (h) Id. 121.C. 4. A Keeper of a Prison, who fets a Prifoner for Debt at liberry, renders himselse

bound to the Creditor for the faid money.(1) (i) 1d.1211A. 5. An Heir is bound also by the Obliga-P.131. B. V. tion of his Ancestor, if hee be named init, Dyer, \$75 m.46 and receives sufficient from him to satisfic, 47.0 fol.278. (k) which however I suppose to be true only where the Moveables will not fatisfie debts, (k) F. N. B. or where the Executors are not mentioned, An Heir also is bound to warrant Lands allenated by his Ancestor, with Charter of warranty, if hee be named in the Char-

1 1d.134. D. ter. (A

7.5.

110.1.

6. If one lets Lands for a certaine Rent, and deviseth the reversion of them to another by Will, the Legatee may claime the

m Id. 121.N. Rent of the Lellee. (m)

7. The Kings Customer having the Kings money

money in his hands, is Debtor to him to whom the King by his Charter hath granted an annuity to be received yearely from

fuch a Customer. (n)

8. Laftly, we are obliged by the Contracts of our Wives, Children, and Servants, for Wares taken in our names, and converted to our uses, as if we had made the Contracts our felves. (0)

(n) Id. ib. F.

(o) Dr.Stu.l. 2. c. 42. Fulb. par.c.contr.fol. 3,4. Plow.fol. 11. Dyer, 234. 7. I7.

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By what Persons an Obligation is acquired unto us.

TIT. XXIX.

N Obligation is acquired unto us by Procurators, and by Children, which we have under our power and jurisdiction; by our selves and children of our own, and by Free-men who ferve us, and that by two causes, Viz, by works of their owne, and for fomething which is ours, Alfo by our own proper fervants, or fervants which are common, or in which we have an use, or others which we do bana fide possesse, provided they covenant and bargain in our names. (a)

all the viner oils of the party off the

where the trade of a class comment. (6) An Out of some stretch of also by fla-Additional varieties of the design of the country o Frech the bootsoon boy book to bink but This is revealinally object, a company

(a) Brac. 1. 31 tr. I. C. 2. 7. 12. Flet. 1.3,0,60.

By what meanes an Obligation is taken off.

TIT. XXX.

N Obligation is taken off by Payment, 1 because every Obligation is removed, when that which was due is paid, whether he payes it who owes it, or another for him; And that whether the Debtor know it or not, or whether he be willing or not, (a) which is only true, according to fome, where the writing [if there were any | be cancelled, or an Acquittance be to be shown by the debtor (b) To the explanation of which affertion, fonce put a difference between a simple and Conditionall Obligation, and affirme, that the payment of a conditionall Obligation may be proved by Witnesles, although the wir ting remain intire, and no Acquittance be shewen: And that because the Party being bound to a certaine time under a penalty, he cannot without danger expect the deliver ry of the Writing or Acquirtance, feeing

Surety is free: And so on the contrary. (c)

1. An Obligation is taken off also by Releases, which is an imaginary payment: As
if it be said; have you received all that so
owe you upon any cause whatsoever? And it

he is more strictly bound, then if the Obligation were simple: So if the party pay, his

a Bracib. n.1. Flet.ib.

b Dr.Stu. l.1.

c Brac. ib

beanswered, or (if the Debt be in writing) written, I have acknowledged to have received all. [d] And this may be done for part of a d Perk. 749, Debt, as well as for the whole: As also allo - 750. Dyer, 222 ther things whatfoever are reduced into a n. 22. Covenant, may be taken off thus, and in the fame way which Obligations are. They may also be renewed, and reduced into another Obligation, or more into one, as if a cermin fumme of money be promifed for many Debts, Causes, and Obligations. [e] There e Brac. ib. n. isalfo a Release in Law, as where a man 13. Lit. 1.3.c. makes his Debtor his Executor; for in this 8.

s. Also if Lands be charged with an Anmity, and the Debtor neglect payment for lome yeares, and afterwards upon the payment of one yeares Rent obtain an Acquittince from the Creditor, the action for the

him the Execution of the office, or not. | g |

refidue is utterly extinguished. [b]

3. So allo by renewing of Altering, as where an Obligation is transferred from one person to another, who cannot be bound, it is wholly loft: As from the person of one who is of age to another who is an Infant: And in renewing or altering, there may intervene a furery and a penalty, as also a Condition: That if the Surety doe not well and truely pay, the Princiall shall remain. [i]

4. In briefe, it is to be observed, that an 1,62 m.13. Obligation may be distolved the same way, and by the same means by which it is contra-Acd.

case hee for gives the Debt, [f] which is so f Bro. Testam. farre true, that it is whether he take upon 118.

h Dyer, f. 271.

i Brac.l.3.tt.

1 Dyer, fo.75:

thed, if it arise from a Contract, or any luch like thing, namely by the thing, as if the thing be restored, by words, as if it be to the contrary, and in contrary words. [4] By writing; As if I write my self to owe money, and the Debtor write that he hath received: By consent, as if they agree mutually to recede from the Contract: By delivery, as in case the thing be re-delivered: By joyning, as in case it be done on the contrary. [1]

1 Brac. ib.

5. Bracton also declares that an Obligation may be taken away by sundry exceptions, and that many wayes, whom any one that pleaseth may read. m

m Id. ib.

6. There is also another way with us, which we call waging of Law; for if any one challengeth money of me upon a simple contract, I may wage my Law against him, [n] i. c. I may promise to come into the Court at a day judicially assigned, and performe the Law. Now to perform the Law, is in this

case; To doe that which the Law requires, namely to make Oath, that neither the sum

n Id. 1.5.17.5. c.13.n.3.

Brit. c.2 8.

required, nor any part of it is due: And to bring others with me who shall affirme upon Oath likewife, that they believe the Oath I have taken to be true. [0] Now this is nothing else but a Judiciall transaction which

F.N.B. 122.1.

our Lawes permit us.

The End of the Third Booke.

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THE

ourth Book of the In-

stitutes of the Lawes of

ENGLAND.

of Obligations arising from Crimes.

TIT. I

HERE are Obligations al-

crimes.

fo which arise from Crimes, or from things of the fame nature. Now Crimes and Trespasses proceeding from words and facts, are to be dilinguished according to the intention and will wherewith they are committed; for the will and the intention are the Interpreters of the facts : And from these Delinquencies proceed greater crimes, as Treason, Homicide, Thest, Rapine, &c. [4] (of which [a] Brec. 1. 3. wee shall discourse hereaster.) Or lesser gr. 1. 5. 2. 11. 14.

crimes, as Injuries and Trespasses; for under these all our Writers comprehend Obligati-

ons arifing from private crimes.

1. The Civill Law punisheth manifest Theft by adjudging restitution to be made four-fold, and Theft leffe manifest by rendring two fold. But the Lawes of England punish neither with lesse then death, provided the thing stollen be to the value of 12. pence. (b)

(b) Fortefene,

c. 46. Bro. Crown. 2. /

2. Thefe is divided into Larceny and Robbery : Larceny is defined : The taking :way of Chattels personall in the absence of the Owner, and is either Crand or Petite according to the thing taken. Grand, is when the Moveable that is stollen exceeds the value of twelve pence. Petite is, when it is under the value. (c) Robbery is, when

(c) Wefim, 1.2. tit. Indiciments 3.58. Spec. 74-

fic. l. I.c.larc. (d) Welt. ib. s.

sence of the Owner. (d) 3. Every Theft with us is a publick crime; for Petite Larceny, though it be not punishable with death, but with imprisonment, and stripes, is according to some, accounted (e) Bro, Coron, Felony, (e) though others are of contrary

it is taken from the person, or in the pre-

(f) Stam. pl. Judgement, (f) Wherefore we shall referre coron.l.I.c.15. this rather to the Order of publique Judgements. 4. Yet wee have thought fit to observe

here, That it is in his choise who loseth any thing by Theft, whether he will profecute the party civilly or criminally. For different bling the Theft, he may suppose the Theire to have found the thing by accident, and lo deraine it to himselfe, and so recover the thing thing it felse, or its value. (g) But of cri-(g) Trover. in minall profecutions wee shall speake here-Book of Entr.

Brac.l.5.tr.5.

c.31,n.2.Flet.
l.1.c.38.Dyers
fol.50.n.5.

Of things taken by force.

TIT. II.

The word Trespasse hath a very large la-I titude, and comprehends every violation of the Law. But our discreet Lawyers call only private crimes Trespasses, and make diffinctions even amongst these; for those who are accompanyed with force, are Trefpasses more properly: (a) Yet they callo- (a) F.N.B.85. there Trespasses likewise from the species of G.Fled.4.c.4. an unlawfull act, though not violent, but accidentall; or (touse their own words) suin the first case bath alwayes these words, 93. E. Terms, [vi & armis] and in the tecond [contra pa- v. Action fur le mm.] But the Plaintiffe may if hee please, case. diffemble the force, as where he brings his Action in the Sheriffs Court, who hath no Cognisance, de vi & armis : And though he leigne a leffer Trespasse, when really it was freater, yet he shall recover damages; and this feems the reason why our Writers do so often confound, and treat promiseuously of (c) N.boo. Enthele rrespasses which are of a different na- tries, tresp.85. ure. (c) Now we have thought it congru- Trespas, sur le P 2 ous cafe. 92.

ous enough to refer violent Trespasse to the title of things taken by force, and the other to the two following Titles. For fince the Roman Law makes the Subject of these Trepasses, which our Law of England divides only into two heads it threefold; left it no Icem strange, that I refer some Cases, which beside the force, affixe a contumely also up on the person injured, to a third Title.

1. Now the Action for Goods taken by force, or de vi & armis, lies as well for things taken by force which are inanimate, as Can, Ploughs, &c. As things animate, as Orea, Sheep, and those not only tame, but wild alfo, if they be in our Custody and Jurisaction. As Conies which are in our Warren, (d) and Pigeons in our Columbaries: (e) So also for our Servants, (f) and for Apprentces, (g) for Wives drawn away with their Husbands Goods, (b) for the stealing away of a Sonne or a Daughter, who is an Heire, and marrying them with any one without our consent, (i) for quantity, as many, (t) for goods of Felons taken out of our Liberty, (1) for Weifs and Strays driven or carryed out of our Fees. (m)

2. And this Action is given for the repairing the loffe luftained; & that not only against the party that did it , but against those that commanded the doing of it, as in every Trefpasse upon the case : (n) But not against the Executor of the Trespassor (o) nor his Heirs,

(p) because it is personalland penall.

magrico vi adendado se

d F.N B.89. K. c Id. 16 A. f 1d. 83. D. I. g Id. 91. I. h Id. 89.0. i ld. 90. H. k Id. 87. M. 1 Id. 91. F. m 1d. 91.B. new Bog . Entr. Trefpafs , Bro. Trefp. Fulb.

wrongs.

n Dr. Siw.l.1

0 Id.1.2.c.10.

P Brac.l. 3. tr.

I. 6.4.7. 4.

of the Aquilian Law.

TIT. III.

Respasse upon the case, is that which ei-I ther brings damage to the person in jured, or difgrace and contumely with the damage, and this the Civilians comprehend under the Title of the Aquilian Law, be cause Cains Aquilius was the Author, being Trihane of the People; of this popular Law, by which thefe trespasses were punished; though they referr this to the Title of injuries.

1. Now he who damnifies the Estate of condition of another, commits a Trespalle upon the case : As for example; where a Sheriff by a Writ directed to him, takes a Debtor and afterwards lets him escape, (a) crupon his return makes falle Information to A.C. the Court, that the party hath no Lands or anything else in his Bailiwick, whereby he may be distrained, and so becomes the occa- b Idib, B. fion of the taking of his Body, (b) so also; he who fixeth stakes in any water, whereby anothers Ship or Vestell laden with Corne, c Id. 92:F or other Merchandise is overturned, (c) d Bo: Entr. moreover an Atturney or Countellor at Law, Altion Sur le who through ignorance or deceit loofeth his case in Auur-Clients cause, (d) a Barber who shaves ano-ney: thers Beard ill, or with a soule Raisor, (e) e Idin Barber:

a F.n.b.fo. 93.

a Phi-

fld in Phili. g F.N.B.93. h Dier fo. 112. n.86. F.N.B.in the Writ of Repleg.averi:fo: 68. and the Writ Vetito nannio 73. k Dier 248.n. 80.andfo.320. 2.38. 1 1d.fo. 36 n. 38. and fo. 256. n.Io. m 6 E.I.C. n Boo. Entr. 10. Action Sur le case, and Trefpaffe, Bre. Trefp.F.N.B. fo. 85 and 92. Fulb.fo.69. Plow. Second part 12.13. Dier fo.36.n 38.f. 208.n 14.fo. 285.71. 40. o Bract.1.3 .fr. 3.c.36.Flet .! 44.17.

a Physicion or Chirurgeon, who either ignorantly or maliciously handles a fick or wounded person, (f) a Goaler who useth a Prisoner more hardly then he ought, (g) he who distraines the Cattell of anothers Plough, where he may make other reasonable distress, (b) or he who having justly taken anothers Cattell by distresse doth not carry them to an open Pound, but to a place unknown, the Rectory of a Church, a Fortrefle, or into another County that they cannot be redeemed or replevin'd by their Owners, (i) he who interverts the Courfe of a River which should drive a Mill, (k) a Lessee or free-holder who commits wafte. [1) But this is speciall in regard that by an Act of Parliament, he forfeits the thing wasted, (m) but in regard the Species which might be referred hither are infinite, I shall rather remit you to those who are more large, as treating expresly upon this subject, then trouble you with too great a glut and multitude of examples. (n)

2 He also is liable to this action who damnifies or hurts another by accident, though it be not through any fault and deceit.

(0)

of Trespasses and Injuries

TIT. IV.

Whis generall notion of trespass we comprehend every breach of the Law, but we shall treat here especially, of that which redounds to the disparagement and contumely of the person injured, as when one strikes, beates, wounds, or maines another, (a) or where without any force he asperceth the credit and reputation of another by approbrious words, (b) or by dispersing libells or falsy imprisoning him, (c) or ill intreating him in any such like sort. (d)

1. They seem also to be guilty of this trespasse, who plot and imagine uniustly against the lives or fortunes of others, whom our

Lawyers call Conspirators. [e]

2. Nor are we only capable of being iniured in our selves, but also in the personsof those who are under our power, as of wives, [f] Children, (g) and Servants, (b] and

Villaines. (i)

3. A Trespasse may be either greater or lesser according to the circumstances, now the circumstances we account seven, viz. the cause which moves the Actor, the Person as well of him that commits, as of him who sufters the iniury, the Place, Time, Quality, Quantity,

a Braft.1.3.c. 19.N.I.Flet.l. 2 C. I. b. Id.ib. r. 2. c.24.n.3. Flet. 1.4.6.40,41. Dier , fo. 105 ... c Dier fo.72 m. 6.fo.75.n.21. fo. 118 n.77. fo. 236.n. 26. d Bract.1.3.c, c Dier fo. 85 M. 87.fo.244.n. 61.F.N.B114 G.115.A.L. 116.M.N. f Bro. Trefp. 43.Fulb.79. g Id.90. h Id. 80. and Bo. Enter. Trespasse in Servant, i Bro. Villenage 24. Trespass 3. Villenage 24.

Quantity, and event. And these are materiall, either as to the aggravating or diminishing the punishment. (k)

k Bracil:3;tr: 1:c:6:Flet:1:1: c:16:and:1:2:

c:16:and:l:2: c:1:

1 3:E:1:c:33: 1:R:2:c:5: and 12:R:2:c:11: m Dier:fo:

285: n:37: nId:155:n:19:

o Brac.1.3.tr.1

p Id.ib. qCoo.l.4.Sian-

bops cafe fo.

s Id.ib Hext c. s Id.ib, Bucklers case n,3.

t Flet.1.4.c.17: u Brac.1.4.tr.

I.C.28:

4. We call a contumely, or flanderous and iniurious words spoken against any noble man, Scandalum magnatum, which deserves

man, Scandalum magnatum, which deserves greater punishment then any other; in regard of the Honour and Dignity of the person injured, (t) unlesse it can be any my justly excused, (m) but it is much doubted whether slanders spoken against a Prince may be referred hither or not. (n)

This Action as all other Actions of melpasse lies against him through whose sauk, and by whose will the Iniury was done. (a) and is given for the repairing the damages of the party iniured; as himself esteemes them, and the Jury who in this case are Judges shall

6. Nor will words which are too generall (q) or which have a dubious Interpretation, (r) or false accusations before a competent Judge, give colour to this Action, besides that it may be defended by Justification, (t) and adnulled by the dissimulation or tergiversation of the pages in the state of the s

tion of the parry injured, [1]

of Obligations which arise from imputed Crimes.

TIT. V.

A Judge with us according to some makes a Brac:1,5,tr, A the fuit his own by mis-judging, (a) but 5, c:15.

athis day the party who is prejudiced and wronged by a Judgement; rather removes his cause to another Court, either by a Writ of Errour, if the Court were a Court of Record, or otherwise by a Writ of false Judgement, and requires amendment and correcti- b 27, Eliz.c, 8, on of the former fentance. (b)

1. Yet are there Obligations with us also from imputed crimes, as in case an under-Sheriff give falle information to the Kings Court, or make default in Executing the

commands of the Justices, the Sheriffhimself c Dr, Stu,1,2,0: hall undergo the penalty, and not he, (c) 24, lo allo, if the Kings Cup bearer do substitute d 25, E, 3, Stat, others in his Office, he shall be obliged for 2,6,21, their defaults, (d) which holds true not only e 14, E, 3, Stat, in the Exchequer, [e' but in other Courts 1,0,9, Dier, likewise where the Officers Deputies do not 161,n,45, and performe their duties, if] as also in Eschea- 238, 38, tors who substitute another whose Act they f crom , Juris, refuse to be obliged by. (e)

1. In the like manner are Hundreds of g 12,E, 4,c,9, Counties obliged to the compensation of Coo.1,4, Mitwhat is lost by Roberies committed within tan case, fo.33,

them; unlesse they apprehend the Theise! (b) And the Neighbouring Villiages, to any place, whose Trenches and Hedges are illegally throwne downe by persons unknown.

i Id:c.45. k Plowd.fo.9. 3. So if a Servant by negligence burn his Dyer.fo. 158. masters House and the neighbouring House #.32.fo.266. to it, the Master is obliged; in like manner, 2.9.

is the Master of a common Inn, if his Servant m Dr.Stu.l. 2. (k) or any one elfe within his Inn, (1) take Monies from any Guest within the Inn, and

n Fulb. Para . the Keeper of a Prison, if any of his Servant v. Contracts fo. suffer a Prisoner to escape, (m) but of this 3. and A you shall finde many other kindes in our learned Writers, (n)

Of Adions.

TIT. VI.

a The Author of the Register, F.N.B Bract. 1.5.tr.5.c.17. b F.N.B. 232. 251.147. 164 d Id.79.164.

N Action and a Writ are often times used promiscuously for a Writ wherein a party is fummoned, containeth a breife and thort narration of the Fact, which produceth an Action. But those Lawyers of ours who c 1d. 170,169. profeste the Explication of Writs, affirm them to be of a far larger extent then Actions (a) for that they contain many extrajudiciall commands of the fupream power, in thole businesses which concern either it's felf, (b) the Common-Wealth, (c) or private persons, (d) but the cheife part of them are in cases of Judgment,

adement, Of which fome constitute Judges, e) some require those who are already con- e Id. 110. ligged to administer Judgment to those who f 1d. 153. 240. demand, (f) some free men for a certain time g 1d.28. from Judgments, for some speciall cause, (g) h 1d.85. ome force those who are unwilling to give i Id. 156. fecurity to bear Judgment, (b) some permit k 1d.39. hole who are in Suit, to substitute others, to 1 1d.70.69. profecute for them, (i) some prohibite and m Regist, Ori-. rep within compasse those Judges who stretch gin. their Jurisdictions too farr, (k) some remove n Reg. Judicicauses from one place to another. (1) Lastly ale. ome informe and commence processe, (m) o Regist. Brev. and others profecute and bring to an end p Bro. Action those which are begun, (n) now those which populer & Sur legin processe are called originall Writs, le Statut. and those which promote and end processe qBrac.1.2.c.3. begun, judiciall, (o)

r. All Actions flow either from the com- r F N.B. fo. mon Law, or from Statutes, (p) but from 145. which foever they flow, they are all either s 1d. 116. against the person, or the Estate, or both. (q) t 1d. 119.

2. Personall Actions are those which arise u Id. 138.

usinft any one from a Contract reals or im-w Id. 92.

puted, or from a crime reals and proper or im-x Bro. Action

puted. Now those Writs which are Issued Sur le case 242

forthin either case upon Contracts are for y F.N.B.85.

the most part these. A Writ of Covenant, z Id. 95.

(r) of Account, (s) of Debt, (t) of Detinue, a Id. 100.

(u) of Trespasse, (w) upon the case, in which b Id. 101.

3. Those which are issued out in either case, d Id. 114. I astouching Crimes, are those of Trespasse, e Id. 171.

(y) Deceit, (z) breaking of a Park, (a) or Inclosure, Rescous, (b) Attaint, (c) Conspitacy, [d] Champerry, [e] 4. Reall

(f) Brat.1.3. tr.1.6.3.7.3.

4. Reall Actions are thole who are main tainable against any one not obliged to us by any Right, because our estate corporall or incorporall, which is immoveable is polleft by him, or as it were in his possession, which he may either restore or name the party in whole name he possesseth it: as if one demands of any one a thing certain, viz. a Fee, Lands, an Advowlon, pretending ones felt owner of it, and fues not for the value, or so muchin the same kind, but the same specificall thing, and for this, that the demandant supposeth the thing his, and brings his Action against the Tenant, who denies it, the Action of Plea shall be against the thing it self. [f]

7. It the thing fued for be a moveabe, as an Ox, an Affe, a Garment, or something confisting either in weight or measure; although the Action or Plea at first seems to be as well against the thing, as the person, because a certain thing is sued for, and for that he who possesseth it is bound to restitution : yet in truth the Action is against the person, because the party sued is not precisely bound to restore the specificall thing, but under a disjunction, either the thing or its value, and he is freed by paying the value onely, whether the thing be to be had or not, and therefore if any one claim a thing moveable taken away upon any occasion, or lent, he ought in his Action to ascertain a value, otherwise it is of no force, nor fignifieth any thing. | g7

6. Now of Actions civill, and for a particuta.1.2.6.60. las thing, as the claim of a particular thing,

fome

of

(g)Brac.1.3.tr. 1.c.4.n.4. Flc-

ome are confessory, and some negative, confellery, where one afhrms a corporall or incorporall thing to be his, as a Fee; also: where he affirms himself to have a Right of going through his neighbours Fee, or ot drawing water, even whether his neighbour will or not, and it is therefore stiled an Action for a particular thing, because he requires his particular incorporall thing, viz. his Right of way through a Fee; and confessory, bequie it is by words of affirmation. Action negative is that which the Lord or owner of a Fee brings against one who is scustomed to have a way through his Fee, denying that he hath any fuch Right, and this Action is faid to be for a particular thing; Because by it the Lord of the Fee doth by it claim his Liberty; and thefe kind of Action are not for the Dominion or property of thing, but onely touching the Right of Effaces. [b]

7. We have also something paralel to that Flet.1.5.6.37. which was anciently called Actio Rescissoria, 38,39,40. for if any one be dispossest of his Estate being n durance, and the Lands descend to the Heir of the Disseisor: the Disseisee hath liberry to recover his possession by his own proer Act, or (as we term it) to re-enter, and f Judgement be given against him, he may reverse it afterwards by a Writ of Erfor, because his absence was not through contempt, but by reason of Durance and imrisonment; and therefore it seems contrary foreason, that he should be prejudiced by my fuch Record, and there is the fame law,

(h) Brac.ib.n.7.

for

i Litt.1.3 c.continuall claim.

for those who are in the Kings service, or who are beyond the Seas in any businesse which concerns the Common wealth, and are in the mean time diffeifed being unable to make their continuall claim, nay there are fome who affirm that he who is beyond Seas about his own businesse if he be diffeised, may up on his return upon his own authority reenter upon the Heir of the Diffeifor, without bringing his Affile. (4)

kid. ibid.

1 13 Eliz.c.5.

8. And there is fomthing likewife which anfwers to that fame, Actio Pauliana, and whichis afforded by a particular act of Parliament, (1) which renders all manner of alienations of Lands and Goods, made by the Debtor to defraud the Creditor, void, and of none effect, and moreover inflicts a penalty uponall those who are guilty of it, and who defend

9. Nor do we want that which equalls the

it as lawfull.

ancient Actio Serviana, for the Leffor may of proper Right distrain upon goods which are brought upon his Fee; and detain themuntill his Rent be farisfied, because we also do tacitely esteem these in the nature of Gages, or Pledges, although this be not with our Distinction. (m) To this also may be added that Actio bypothecaria, & quali Serviana, for if any one receive monies borrowed of 2nother under a Pledge or Pawn, and cannot afterwards receive his pawn upon tender of the monies, the Creditor refusing to redeliver ir, the Debtor may in this Case have his Action, (*) and he is faid to fue upon an n E.n.b.86.G. Action quali Serviana, who being feiled of

Land s.

m Bro. Diftrefse 13.57.99.

Lands, as by way of Mortgage, is diffeifed or ciected out of them.

10. Now writs which are proper to reall Actions, are either to recover a property, or s possession, (o) those which appertain to a o Flet.1.6.c. 1. property are writs of Right which are of divers kinds, (p) and those also which are of p F. n. b. I. the fame nature. (q)

11. We may fue for a possession, or for that q 1d.157. which is of the fame nature, whether they Plow.357,358 be loft by force, or detained, being commitnd voluntarily to another against Right, in which the former Cases we may be relieved by weirs which we call Affiles, (r) and those rF. w.b. 177.179 which are of the like nature. (s

12. And for the recovery of a pollession which being voluntarily delivered to another nuniustly detained. There are writs of Entry of divers kinds, and others like them. (t)

13. Preiudiciall Actions also are reckoned mong reall: now those are termed prejudiciall which arise from incident and emergent questions, in which it is inquired, whether one be born free or not, if not, then whether he be actually free or a Servant? a Son of not a Son? and if a Son, then whether regitimate or Bastard, &c? (u) and they are u Brac.1.3.tr. I. called prejudiciall, because they are judged c.4.n.9.Brit. and determined before the principall Acti- c. 108. 00, (77)

14. Actions which are mixt, being as well against the thing as the person, and so called because they have a mixt cause relating to both, as the dividing an Inheritance beween Co-heirs, the fetting of Bounds a-

6.11.19.193.

181,183.134. 88.190.191. s 13.Ed.1. c.25.Brac. 1. 4. t F.n.b.201. 205.206 Brac. 1.4.17.7.

w Id ib.

mongst

mongst Neighbours, for if we respect the per fons, they are both complainants, and to spondents, although he is not properly said to be complainant, who cites the other to come to Judgement. The Writs which are proper in thele Cases, are thele de Partitione,

[x]de rationabilibus divisis, [y]de perambulati-J Id. 121. one facienda, [3] de Ciria claudenda; [a] de reparatione facienda. [b]

> 15. Furthermore there are Actions which are given either folely as penall, [c] or as beneficiall to both, which some call Civill,

criminall, or mixt. [d]

16. Those which relate meerly to a particular thing, are all those which grow from Contracts, or of the same nature, and claim nothing for wrongfull detaining, or nomine pene, as a punishment of the Crime, (e) and those are penall, which are ordained for the preventing of misdemeanours, of which for are those popular Actions which are given to Informers for the benefit of the Exchequer, and themselves against the breakers of Statutes, (f) and those relate both to the thing, and person, which regard the thing as the principall cause, and the person as to personall performance, (e) of this fort is a wik of Affile which claims the thing, as to reftitution, and yet is against the diffeifor, as to Dammages for the iniury, (b) and a writ of waste, which requires the thing wasted, and trebble dammages. (i)

17. There is also a third division of Actions, for that some give barely the dammages sustained, some double, some trebble, and

[x] F:n:b. 61.

Z | Id. 133.

2 1d.127. b]Id.ib.

(c) Brac.l. 3.tr. I.C.4.11.5.

d Glan . 1. c. 1. Mrac.1.5 .17.5.

6.31.Littl.c. Keleajes.

(c) F. n.b.fo. 1.

(f) Id. 171. (g) Brac.1.3. 27. I.C.4 n.5. (h) 1d.i.4.tr. 1 c.6.n.3.

20 H.3.6.4.

(i) 6 Ed. 1.c.5. (k)Brac.l.3.tr. 1.6.4.7.6.

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ome ten-fold. (4) Those which give barely (k) Brac. 1. 3. he Damages Sustained, are all Actions of ir.1.c.4.n 6. respalle. (1) Those which give double da- (1) New book mges, as against fuch as make an aslault a- of Entries. winft those who are called to the high Court Trespasse. Parliament, (m) and against him who (m) 11.H.6. rolecutes any Action in the Court of Admi - 6.11. alty, which is not within the jurisdiction of he Court : And laftly , against those who ntoo high a rate upon Victuals. (n) Treble (n) 2. H.4.c. amages are against those who unjustly ex- 11. at money tor the probate of Wills and Teaments. (a) Or who cause Ryots. (p) And m-fold the damages are recoverable against buror who receives a Bribe for bringing in Verdict. (9)

18. Befides, wee have not unaptly faid (q) 16. & 1. one Actions to be bona fidei, and some of hid Right; for though no such distinction expressy found amongst our Lawyers, yet Damages which we receive from Contracts Trespasses are left and remitted to the emy of the Jurors, what, and how much it and Judgment is given according to their marion. Where on the contrary, in Actiwhich have reference principally to the hing unles the complainant prove the thing Action to be due, and to be his, the Actiufalls, because neither the Jurors nor the ordenn the Defendant, as to the thing in dion, or to free him. Whence it happens, bat one and the same thing often occasions double Action, viz. a principall Action for

(o) 23.Ed.3. (P) 3. 64. E.

the thing which is of strict Right, and and ther which is accessory for the recovery of

Damages, which is bona fidei.

19. In the distinction of arbitrary Acie ons from Actions, bona fides. The Civilians doe not very punctually agree. Nor do wee find any other of them in use amongst usin England, more then these we have observed: Only this we may adde, That the Chancel lour of England, or the Keeper of the Great Seale [whole Authority is almost the same] to whole Conscience and Equity every one who is without remedy in the Law may appeale from other Courts before Judgement given, is not bound or prescribed by any Lawes, but that hee may decide and compole all causes which are for this purpole brought before him, according to the Judgement and Conscience of a Good man, and imprison him who is contumacious and refractory to his Decrees, and detain him there

Plowd. 332. untill he becomes conformable. [r]

A colony and and a land

was called Affio de Peculio, in regard we are not obliged by their Contracts, who are under our power, unlesse so farre as they be in

s Dr. Stud. 2. order to our Commands, [s]

What

What is said to be a Contract mude by him who is under the power of another.

TIT. VII.

Those Contracts which are made by our Servants by our command, are binding bus: [a] For if I make one of my Servants a V.n.b.62.F. by Bailiste, and give him a power of taking n.b.120.G. Ozen or other Cattel to graze in my pasture facerrain price, I cannot have an Action frespasse, or de conculcatione herbarum aun his Carrel into my Pafture. [b] b Bro. Entries. 1. But if my Servant shall borrow mo- Trefp. in Agift.

ters in my name, I am no way obliged exmy consent, [c] which is also true in what c V. n. b. ib. Contract soever. (d)

1. But if I fend my Servant to a Market, c. 42. he not design any person, I am obliged to him of whom he buyeth those things in my me. But if he buy them in his own name, without mentioning me, then it is othertife, unlesse the things so bought come to my use. (e)

e Id.ib.

Q 2

3. If

3. If also I send my Servant to a Market to sell something of mine which I know to be unsound, to A. In this case I am obliged by such Bargain and Sale: But if I give him order simply to sell it to whom he can, here no Action will lye against me. (f)

f Id. ib.

4. If a Wife buyeth any thing in a publique Market, and the party of whom the buyeth it trusts her for the payment of the price: In this case her Husband is not bound unlesse the thing bought be converted to his use. (2)

g V.n.b. 62.

3. But in some Cases the Law presument a Consent of the Master (although there is none particularly expressed) in the contrast of a Servant; as in those whom Merchant place in their Shops or Ware-houses, as sa ctors: For that the daily and continual presence, knowledge, and sufferance of the Master doe sufficiently argue his consent, who there it be Wife, Children, or Servant, who so trade in his Commodities.

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er sales along a long sales

of those Actions which by the Civill Law lay against the Lord for an Offence or Crime done by his Servants or Cattell.

TIT. VIII.

This Action which is called Noxalis Actio, and lies against the Lords for the crimes of their Servants, is unknown to us in England; for that they themselves may be convened for their proper Crimes (our Villains not being otherwise Servi, then as they are Ascriptini) unlesse that any one commands his Servant to doe an unlawfull Act, for in this case he is no lesse concerned then if hee had commanded any other, who was not in his power, or under his subjection. (a)

1. Yet as to bruit Beasts, and things inanimate, by which a man happens to be
slain, we have something like to the Noxalis
actio in use with us. For if a Horse by kicking, or a Bull running madde, or a Cart
drawn with Oxen happen to kill a man, this,
whatsoever it be, is in a manner sacred, unlesse it belong to the King.) And I question
whether it were not the ancient custome to
burne them: But at this day they escheat to
the Supream Power, yet so, as that the

(a) Dr.Stu.l.

thing being fold, the money for which it b Id. 1. 2. c.3. was fold is disposed of by the Kings Almo-Stanf.pl.crow. ner, and employed in pious uses, and it is for that Cause called Deedand, (b) 1.1.6.2.

> Whether a foure-footed Beaft may be said to commit a Tre paffe or not.

TIT. IX.

IT is a rule with us, that every man is obli-Iged to repaire those damages which his Beaft, though against his knowledg, commits upon his Neighbours Corn, Graffe, Trees, or Fruit, either by eating, or treading of them. (a)

a Dr.& Stu.l. 1.6.9. Fulb. wrongs , fol. 81.

I. And hee that is damnified by anothers Cattell, may detaine them in a publique Pound untill he be fatisfied as to the Damab Id.l.2.c. 28, ges: (b) So that if they dye for hunger, it is at the Owners perill, and not at his who did impound them. But if the Owner offer sufficient for fatisfaction of the Damages, and the other refuse, the Owner may release his Cattell by the office and power of the Sheriffe, giving fecurity, that either they shall be forth-coming, or that he will pay fo much money as shall be adjudged due for the Damages: (c) And if upon the tryall of the bufinele before the Sheriffe no Damages ap-

peare,

c F. N.B.Reflevin.

peare, then the Owner shall by this meanes

recover Damages for the detinue. (d) d F. N.B.69. 2. If ones Dog chase anothers Sheep, or G.

bite them, by which meanes they either caft their Young, or dye, or take any other hurt, the Owner of the Dog is bound to make latisfaction, (e) which notwithstanding e Boo Emries. some deny, unlesse the Owner of the Dogge Trefp. in Chein. knew that he would bite, (f) or elfe fet him f Dyer, fol. 25. on. (g)

3. But if any one be driving a Flock, or g Id. fol. 29.11. Herd of Cattell in a publique way, and they 195. happen fuddenly to break into another mans ground, the party following them, and

endeavouring to keep them from committing Damages, is no Trespasser, (b) but yet hee h Dr. Stu.l. 1. is bound to repair the Damages if any be 6.16.

committed. (i) i Fulb. c. 10. wrongs, fol. 81.

Of those by whom we may sue.

TIT. X.

A7Ards and Infants ought to fue by their Tutors, Guardians, or Attorneys, unlesse in such cases in which Infants are bound to answer, notwithstanding their Minority; but what those are is to be enquired of others. (a)

1. It feems that in ancient time it was at 2. c. 1. 2. the pleasure of the Judge whether one should have his Attorney or not, because the Writ feemes

a Brac. l.s.tr.

[b] F.n.b.fol. seems to require a personali appearance. (b) 25.C. But this is by degrees changed by Acts of [c] 20. H.3 c. Parliament; [c] fo that at this day nothing is 10.9. Edw. 1. more frequent and common , then for every 6.8. 13.E.1.c. man in what cause soever that is private, 10. 27. E. I. whether it be reall or personall, to sue or Stat. 2. 12.E.2 defend himselfe by his Attorney, Yet at this Se. 1: 6. 1 15. day we might find many cases, in which wee E.2. 7.R.2.c. are wholly forbid: And others, in which it is 14. 4. H.4.c. not permitted to make use of an Attorney 18, 19.7.H, 4. without leave from the Juftices. [d] c.13.5.H.5.2 2. An Artorney also, or Procurator, ac-H.6.c.3. 9 H. cording to the ancient Authors, may make 6,c.10, 15,H.6 Oath for his Mafter. [e] c. 7. [d] F.n.b. fol.

26.D. Bro. Attorn. 69.81. [e] Brac. 1.5.

[e] Brac. 1.5.

Of giving of Pledges or Se-

TIT. XI.

In appears from the formes of most Original Writs, That the Plaintiff was bound to put in security, and give Pledges for to prosecute, before the Desendant could be distrayned, taken, or forced to put in Baile.

[a] But this custome is long since ceased, and those words of the Writ are become meerly formall, as many Practicers have told me: For that the Sherisse in his return of the Writ names Pledges for prosecution, not as to oblige them to any Processe, but

[a] Spec. Inft. 1.1.c.des. Artic, &c. to avoid Errour, fince that really there is

no body obliged.

1. How the Defendant in former times gave caution, or put in Baile for his appearance, many have declared at large, but that for the most part is altered. Wherefore for themore full handling of this businesse, wee have thought it needfull to run over and ex-

amine the custome of every Court.

3. The Upper Bench in the Infancy of the Law did for the most part handle criminall causes : And [if that be true which wee read] tooke little cognisance of private contracts, unlesse it were out of particular favor, but left them to be decided by the Justices of the Common Pleas, the Sheriffs in their County Courts, and Barons, and Lords of Mannors. [6] But at this day it receives and b Glan.l. I. c. determines all civill Actions which can but 2,3,4.6.1.8.c. be drawn within the compasse of Trespasses, 10. & 1.10.c. no armis, or contra pacem : [c] And the 10.18. Defendant, if taken within the same Coun- c Cromp. fol: where the Court is (viz. in Middlefex) is 47. brought to answer any private Action whatleever without distinction. [d] But if it be d This writ is not found in that County, then he is suppo- called a Bill of ed, under the pretence of fraud or contempt, Middlesex. to sculk in the County where he dwels, under which colour he is commanded to be taten, and to be committed to the Marshall of the Court to be kept. In whose custody so some as he shall come, because he is now in the same County where the Court is, he may be compelled to answer any Action whatfoe- e Dyer, fo. 217 ver, [e] and to put in Baile to the Action, v. I.

unlesse he will goe to prison: And by a Writ of Errour every Action, together with the Records of the Court which concerns it, may be called into this Court at this day, notwithstanding that it could not take its beginning

f F.N.B. Bro. there. [f]

Error. Crompt. fol. 47, 48.

g Brac. 1.5.tr. 5.6.31.n.2.

3. In personall and civill Actions which are prosecuted in the Common Banck, or Common Pleas. There first issueth forth a Summons, (g) which is taken out of the

Chancery, as all originall Writs are. And if the Defendant be not found; or being found, doe not appeare, there is islued forth a Capias, Alias, & Plures, yet so as there are fifteen dayes intervene each Writ: And if he be taken, he is committed to prison to be kept till the day of his appointed appearance,

kept till the day of his appointed appearance, unlesse he give security to the Sherisse (who is the person commanded to take him) for

his appearance; which being done, he could no longer detain him, except it were for some h. V. N. B. 41. particular causes,: (b) But if after the Plures F.n.b.66 E. they could not be taken, then an Exigent

was issued to the Sherisse, in which he is required to demand him in open and publique County Court for five Court days together, to make his appearance: And if hee did not appeare then, he was deprived of the Kings

protection, and lost the benefit of a Subject, for he was proclaimed out-law'd, and all his Goods, Chartels, Rents, and Profits of

Lands, and whatfoever did naturally grow thereon were forfeited to the Exchequer,

notwithstanding that the Action was per-

i Bra. forfei-

4. In

4. In reall Actions, if the demand be of Corporall thing. The Defendant is first fummoned: And if he appeare not, then the thing in Action is feiled into the hands of the Supream Power untill he do appeare, (k) (k) V.N.B. for which is done alfo, if after his first appea- 126. 161. rance he delay to answer. (1) If it be a Right (1) Id. ib. which is in question, and cannot conveniently be taken , then the Defendant is fummoned, and nor appearing, his Goods are diffrained : (m) But I cannot affirm this rule (m) Id. 71. le constant as not to faile. (n) But there is 27. no great necessity of being exact here, in (n) Assistult. regard every Writ hath a forme in it of ta- present.fol.26. ting fecurity, by which the Defendant is bound in Law. [0] (o) Regift. O.

There is no Processe lies against the rigin. bodies of Parliament men, or of Bodies politick, but they are first summoned : and upon their contempt, their Goods distrained untill they appeare : For the Law prefumes them who are Parliament men are able enough: [p] And bodies Politick have not (p) V. N. B. visible Existencies whereby they may be ta-fol. 61. ken. [q] And Noble men and Prelates who (q) Plowd. claime the Titles of Peers, and who fit in 538, 539. Parliament, have alwayes had the priviledg, That in Corporations and Burroughs through which they passe, their Horses cannot be distrained for Debt upon a Contract or Trespalle, so long as they have other Charrels there by which they may be diffrai-

6. There are certaine Cases wherein the 93. 1. Defendants body may be taken without fum-

ned. [r]

(r) F.N.B.fol.

mons,

mons, and hee be compelled to put in baile for his appearance, in which cases his Goods may be distrained, though he be not perfonally taken, [s] as Trespasse and other cas F.n.b. Trefp. fes of the same nature. [1] And if the Defo.85.92. V.n. fendant have not Goods, then is he fued to the Utlawry.

b.49. t V.n b. 121.

57.69.92,93.

7. In the Chancery, in cases of Equity, there is first a Summons under a pecuniary mulct of a hundred pound, to appeare at a day prefixed; Which if they neglect, then their bodies are taken, if found, and either they are committed to prison, or forced to put in Baile : But if they be not taken, then Proclamation issues forth, and is made in divers places of the County publiquely, wherein they are summoned upon their Allegiance. And if upon this they appear not, then a Commission is islued forth to certain Eminent men , in which they are permitted to scize them as Rebels, and to bring them, or cause them to be brought into the Chancery by a day prefixed in the Commission. [" But even here also Parliament men injoy their priviledge; That the Lords Chancellors by their private Letters doe gently intreate them to appeare, and answer by their Attorney. [w] But if in this Court Processe be according to the custome of the Common Law, as upon an account, [x] or an Audita Querela. [y] Then are they Plowd. 72. also compelled to appeare by Writs fitted for the exigency of the bufinetie.

2.Seft,22,23, 24.

u Weft. part,

w Id.ib. 21. x Cromp. 41, 42.

8. In causes criminall which are capitall, as in Treason or Felony, there is first a Ca-

pias,

pias issued forth, then Alias, & Plures, then an Exigent, and upon non-appearance, they z Lambert. are out-law'd, (2) but if they be apprehended they are in some cases committed to prifon; without any hope of being released unull Judgment paft, (a) but if it be only for a a 1. Weft.c. 15. fleight suspicion of Felony, or for Petuc Lar- 23.H.6.c.10. ceny, the Sheriff may take Baile for appearance, and is compellable upon his refufall. Mar. Lambert (b)

9. If the Offence be not capitall, the Sheriff is commanded to cause the Defendant toappear, at a certain day to answer certain Articles, and if he come not; the Sheriff is to make his return, and certefy the Justices, whether the party have sufficient Goods and Chattells, or whether he have nothing. For ifhe have, his Goods are to be distrained, till he come, if not, then Process issueth forth

untillhe be out-law'd. (c) To. There are other particuler waies of C Lamb.in proceeding, in causes criminall, expressy appointed in particular cases which are to be collected our offuch Statutes, wherein they are injoyned and prescribed. (d)

11 There are also certain cases in which 8.9.505. the Plaintiff upon his own Authority scafeth the Goods of the Defendant, and requires e Dr. Stud. I.C. him to come to make an extrajudiciall fatif- 7.V.F.n.b.fo. faction, or at least to come to Judgment : As 41. for Rent which is due ; either as a Service, f Lit.l.2.c. Res (e) or as charged (f) upon the Lands. leafe:

deligner of the section

1& 2. Phil. and 1.3.c.2.pa.334 b V.F.n.b.fo.

d Lamb .1.4.C.

Mark to said out of the beat of Of

Of Perpetuall and Temporall Actions which discend to Heirs and against Heires.

TIT.XII.

F Actions there are some which are perpetuall, and some which cease at a cerrain time, for although Bracton affirmes, (a) (a) 1 3.17.1.c. almost all Actions to be temperall for want of sufficient proofe, yet this hapneth not so much from the nature of the Actions, as from

the difficulty of proofe.

I. I call those perpetuall which cease only tacitely through continuall forbearance, and which have not any fet time expresly allotted for their continuance. Of the second fort there are many which arise both from the common Law and Statutes. For thefe if they be not profecuted within the time limired, do cease and fall: For example, the Owner of a Park hath an Action against any one that hunts in his Park, if he fue within a year and a day, but if he let that time paffe, I Westm.c. the King only may prosecute the Action. (6)

3. 7.5.

2. But there are some which are so perpetuall that no process of time can extinguish them: As those which by the Law of Nati-

ons are inherent in the Crown by reason of the Kings Priviledg and Prerogative. As of things which have no Owners: Alto of Things, Liberties, and Dignities, which appertain to the Kings Crown, and in which cales no time occurs against him, if he require them: Where he hath no need of proofe, but may recover without proofe, unlette the party impleaded may have a Warrant, i. e. a speciall liberty granted by the King, because [c] Bratt.1.3. he makes no defence from prescription. (c)

3. There are also some so purely temporall that when the person dieth they neither discend to his! Heires or Executors, nor do they lye against Heires or Executors, As those which are penall, for a Penalty ought not to be extended to any other then the Authors, nor to proceed further then the crime [d] Id.c. 2.3.2 extends it felt. (d) & 5.& Latr. 1

4. Nor can Heires or Executors fue or c. 20,n.11. Dr. be impleaded from Covenants in writing, un- Stullag. 10. leffe there be particuler mention made of them in the Instruments of Covenants. Now what Actions are temporall from the Statutes of the Common-Wealth we have shown be- [e] Lit. afesti fore. (e)

Prescriptions.

tr.1.6.3. 7.5.

Of Pleas and Exceptions.

TIT. XIII.

Haines that we speak something of Pleas for Pleas are in the place of Actions, and in respect of Actions are tearmed Pleas or exceptions, in regard that one impugns the other, and as those who so are armed with Actions are prepared as it were with Swords, so the Desendants on the other side are guarded with Pleas as with sheilds and bucklers, [4]

2 Brac.l.g.tr. g.c. 17. Fleta l. 1.c.32. b Id. bic. 1. Fl. l. 6. 6.36.

c Id.l.3.tr.1.c. 2m.13.Brit.c. 28.fo.66.

d Brac.l, 3 .tr.

e New tearmes
Acquittance.
f Brac.ib.

1. Now an Exception or Plea is as it were the cutting afunder of an Action, by which an Action is destroyed and descated. (b)

2. An Action is taken away by the Plea of Per metum, & dolum, as if one pleads such an Obligation to have been extorted from him, Per metum & dolum, (c) so also by reason of not counting or telling Money: As if aman, promise Money to another from whom he expects to have the same in a small time counted to him, he may have this Plea against him, afterwards when he shall demand it, yet it seems that this Plea wil not prejudice an obligation in writing (d) unless the Defendant can also shew an Acquittance in writing, (e) also by Contract, as if one first covenant that he may demand and then, that he may not demand, (f) or if one doth make satisfaction

and

nd recompenceth any way a trespals comnitted by him, and so takes away the cause Action, (g) fo also by an oath, according g New tearmes o our ancient writers, viz. When an Oath Record. all be brought, or related, and afterwards h Brac.iv. worn, (b) and lastly, by pleading a former udgment, as if the Ancestor of the Plaintiff any of his Heires loft the thing in Action ya judgment in cale of property; as by a Grand Affise, or by Bartaile, or by verdict of Jury, upon whom they had put themselves.

3. Of Pleas, some are dilatory, and some Peremptory: (4) and of those which are dilaay, some are Peremptory, as to the Jurisdifion, and dilatory as to the Action, and not erem story: And in like manner some are temptory as to the Writ, and dilatory as to be Action: (1) fome Pleas also are generall to all Actions, and some speciall which reallowed only to particular Actions. For Actions have their proper Pleas, accoring to the form of the Actions. (m)

4. And there is a kinde of Plea which we all a waging of Law, and which is (as to iw) peculiar only to us English; for the Pefendant is admitted for the defeating of an dien of Debt which the Plaintiffe proves aly witnesse without any specialty to wage his aw, i. e. to make his defence against the buit brought by the Plaintiff by two compurmors for every witnesse that is produced unothe full number of twelve: now in this cafe himself first makes oath, that he doth not we the fumm, demanded, nor any part or parcell

i Id.1.5.17.5. c.28.n.7. k Brit. C. 29. Termes, v. Barr Flet .1.2 c.54. and 1.6.6.36.

1 Termes,v. Addition Flet. 1.4.c. 10. Sett. 1, 2, and 1,6.c. m Brac.l.s.tr. 5.c.I. in the beginning.

n] Flet. 1.2. .63.

o) Dict f.23. .143.

parcell of it, and the Compurgators swear out of their own credulity, that they believe the Defendant to have made a true Oath, (1) but against an instrument or Specialty (as we call it) a Wager in Law lieth not. (0)

5. Generall pleas are thole which liegenerally against all Actions: As the Pleasgainst Jurildiction against the Person of the Plaintiff, against the VVrit, that Plea which ariseth from time, according to the divers forts of Actions, and that which comes by reason of the place through the Errout of bringing the Action there; now all these are dilatory as to the Action, and as it werebefide the Action, and therefore they do not de-

[P] Brac.1.5. feat the Action although, (p) they do deferit trat.c.t. Spec. and abate it for a while.

Juft.1.3.c. Ex-

6. Nowone may use many Dilatory Pleas ceptions dilato- and severall, provided they come in their ry. Fleta l. 2. proper places, but if there happen to occur 661.1.g.c. 10, more then one, which are peremptory, as to the Actions, the Defendant ought to propole and prove one as contingent to the Actions, as where a man hath many Actions one ought to be tryed, because if the Defendant should fail in proof of two Pleas, he may have recourse to the rest, and prove them, as if he were to defend himself with many weapons, which ought not to be, if the

[q]Bracib.c.1. proof of one be sufficient. (q) 2.7.

of Replications.

TIT. XIV.

A Galast a Plea or Exception which seem-Acth plausible, and sull at the first sight.

The Plaintiff may releive himself by a Replication, as if a man brings his Acton: the

Defendant may plead a Covenant interveaing to hinder the demand or Action, against

which the Plaintiff may in his Replication

produce a Covenant inserted after that

which doth permit and enable him to sue and

demand. (a)

1. After a Replication follows a Duplica-5.c.1.m. 4.Fle. tion, after a Duplication, a Triplication, af-1.6.3.36. ter a Triplication a Quadruplication, as the Case requires, and so ad infinitum. And so it may fall out, that an Action, which prima said faire seems good, may be descated by a Plea, and in the same manner a Plea, which seems good by a Replication, and so in the rest.

2. Our Lawyers, call a Duplication, as well in the Chancery, as in other Courts a Rejoinder, and a Triplication a Sur-reioinder, (b)

b wests Proceedings in Chancery, Sect. 56,

Of Probibitions.

TIT. XV.

I Nterdicta are wholly out of use amongst the Civilians, so that at this day they make no difference between them and Actions, The Roman Pretors used them cheitly to reprette tumultuary and fudden violence, especially in the Cases of possessions, but in these Ca-(a Brac.1.3.6.7 ses our Ancestors were wont to delegate and depute Justices of Oyer and Terminer, and Justices of Assises, and those not to determine all causes at set times, as now, but upon every particular emergency, fo foon as it first arose, (a) but as things now are thele kinds of businesses are dispatched by Actions or decrees, which we call judiciall Writs, or 'at least by the help and assistance of the Sheriff, and Justices of the Peace in every County: (b) but who foever defireth to read what our Sages of the Law have written concerning or recovering of a possession, let them read Brafton, (e Briton, [d] and Fleta (e) in their proper places.

71.2. (b) 13 R;2. Stat. 1.6.7. 15 R.2.0.2. 8 H.6.c.9. 13 H.4.C.7. 19 H.7. c. 13. 2 H. 5.4.8. Lamb.1.2.c.4. and 1.3.c.1. C71.2.6.17.6 1.4.C.X. d7c.40. c71.3.6.15.0

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Of the penalty of those who are rashly Litigious.

TIT. XVI.

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A Mongst the Ancient Writers of our Law there may be many marks found of the feverity wherewith our Ancestors punished, those whom the Islues and ends of their fuits proved and manifested to be litigious without cause, which although it seems to beat the present more remisse, yet is it not wholly laid afide; for if any be found raifing fuits against others maliciously, they are adjudged to bring a scandall upon the Court, and are oftentimes for their offence committed to Prison. (a)

1. But this is for the most part the custome at this time, that the Plaintiff, if he be cast, is adjudged to pay unto the Defendant the Costs of his Suit, (b) and the Defendant if (b) 23H.8.c.15 overthrown, payes to the Plaintiff the thing 24.H.8.c. &_ in Action with dammages and costs of Suit, And although it be the constant Custome to pronounce the parry caft to be in misericordia Regis, (c) yet those words as to the Plaintiff, (c) F.n.b. are of no use, and as to the Defendant one- f.77.K. ly, where he betrayes too much contumacy in the maintenance of fuch a cause, which is manifestly uniust: but if he appear malitious, then is he to be taken and made to pay

(a) Bro. Ent. tit. Attorney. F.n.b

his Fine to the King for his contumacy, yet is this Fine for the most part very easie when

he is taken. (d) (d) Dier f.67.

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2. The License and Liberty appears to be very great, which our Ancestors permitted to those who were contentious, that they might meerly through envy, and the pleafure they took in being vexatious, take men upon Writs, and force them to put in Bailin the Kings Bench, or Maritalls Court, and oftentimes to appear, and yet be unpunished, though upon their appearance they objected nothing against them. But this is prudently remedied by an Act of Parliament, which renders all those who procure any one to be arrested, and upon their appearancerefuse to prosecute liable to pay them their Cofts and Damages. And for that the impudence of some had gone so far, as to feign fomerimes fuch persons, as were not in being, in whose names they caused others to be arrefted, that Statute condemneth such Delinquents to fix moneths imprisonment with-[e 8 Eliz.c.1. out Bail or Mainprife. (e)

17 K.2.c.6.

3. But for the suppressing the Power of fuch litigious men, whom the bare hopes of recovering their Cofts of Suit, will fir up to fue even for a trifle, it is decreed by Ad of Parliament, that who foever should bring a Personall Action which concerned neither Title of Lands, free Tenement, Inheritance, or Battery in any of the Courts at Westminster, in which Action the Judges of the Court should value both the Debt and Damages to be under forty Shillings, that the

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Court. (b)

the Costs of such Suit should not be assigned greater then the principall value. And that whereas the Sherists and their Deputies were wont formerly to cite and Summon the good people of England without any warrant or Writ to the said Courts, or to imprison their bodies, or distrain their Goods, that from thenceforth they should not dare to attempt the like, and he that made Default in this, or caused another to do so, should be committed to Prison without Bail or Mainprise, until he had, besides Damages and Costs of Suit, paid ten pounds to the party injured, and twenty pounds to the Ex-[f]43. Eliz.c.6 chequer. (f)

4. Nor shall a man escape unpunished, for moving or beginning every Suit rashly, for in some Cases, if the Plaintist upon the Desendants appearance desist, he shall pay Costs, (g) as Informers upon penall Sta-[g] 23 H.8. tutes, if after the Suit begun, they delay, 6.15. discontinue, or be non-suit in the same, or have the Triall or matter passe against them, by Verdict or Judgement of Law, they shall pay unto the Desendant his Dammages, and Costs which shall be assigned him by the Than The

[h]18.Eliz.

any one under the pretence of any crime, whereby their lives, credits, or Estates are in Jeopardy, are liable to an Action of con-(i]33 E.I.Sta. spiracy, (i) which presumes malice: where-3.3 H.7.6.1. by they shall be compelled to pay the full Damages sustained by such accusation or eviction.

Lk F.n.bf. 115.7. (1 8H.6.c. 10.

viction, (k) and in some Cases they shall pay treble Damages. (1)

6. And I have heard from some practilers, that it any one in forma pauperis procure a Liberty of bringing his Action in the Upper Bench, Common Pleas, or the Chancery, according to the Statute, (m) and betray rather a Spirit of Contention in the end of the Suit, then a just cause, that such person shall have corporall punishment. (n)

(m) 11 .H.7. C. 12.

(n 23 H.8. C.15.

7. But our Ancestors were wont to deter men from their light, and rash Suits by an Oath, for it was prohibited every one to bring any Action of Battery before the Kings Juflices, (unleffe it were for wounds or maims) without they first made Oath that his Plaint was true, or an Action of Trespals for goods taken without making Oath that the Goods taken were worth forty shillings, at the leaft. (o)

(o) 6 E. I.C.8.

p 32 H.8. 6.14.27 Eliz c.5,& 6. Plom. 83.522,523.

8. There are many Statutes made by the no leffe prudence then equity of former Parliaments, (p) for the speedy deciding of Suits, which that they might be preferred before 6.30. 18 Eliz. private ends and profit, were to be wished by all good men, in regard they do principally recommend the truth of causes to the Justiflices, rejecting all malitious calumnies of those who are subtle, and litigious, and amongst these that is worthy to be numbred, by which the crafts and knavery of under-Sheriffs, and their Officers and Bailiffes arc

9 27 Eliz.c.12 restrained. (9)

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Of the Office and Duty of a Judge.

TIT. XVII.

Ur Kings were wont formertly at their Inauguration, or Coronation, to take an Oath to this Effect, viz. that they would keep inviolate all the Rights and Liberties of Holy Church, which were granted unto her by the Christian Kings of England, That they would keep without impairing or diminution, all and fingular the Land and Dignities appertaining to the Crown, and indeavour with all their power the restitution of such as were impaired or lost, if any were : that they would cherish the quiet and Peace of the Church, Clergy, and people; that they would keep and observe the ancient Lawes and Customes of the Kingdome which were received and established by the consent of the whole people, and abrogate all such Cuflomes and Lawes which were ill and naught. And lastly, that they would to the utmost of their power, assure Peace to the People of their Kingdome, and procure it from others. (a)

thers. (a)

1. The Oath of the Justices of the 1.c.9.n.2. F.n.
Superiour Courts, and of the Barons b 232.A. Spec.
of the Eychequer, are to this effect, Justic.1.1.c. 1.
wiz, that they will well and truly serve the Flet.1.1.6.7.

King

King and his People, and not confent to any thing which may tend to their prejudice

or Exheredation, that they will not take Fee, nor Robe of any man but the King, that they will not take any gift of any one whole cause is depending before them, except meat and drink, and that of a small value, nor any thing for any cause, after it is tryed, (b) that they will not give counsell to any one in any case which concerns the King, under the pain of being at the Kings Will, as to Body and Goods, that they will not be deterred by the Kings Letters from doing and ad-

[b]Brac.ib.c.8 n.2,3.& n.9, 10.

[c] 1 E.3.c. 8. 20 E. 3. c.1. Dier 138.n.27

2. This we have even from the very beginning unto this present, that where any one is sued in case of property of a Fee Simple, for Lands or Tenements, it is at his choice whether he will be tried by his countrey or by Battell, if he prefers to be tried by his countrey, the businesse is determined by a Grand Assie; but if by Battell, then a day is appointed, upon which the Case is committed to two combatants whom we call Champions, according to the Law of single Duell, between whom it is decided by the event. (e)

3. The ancient custome of the Nation re-

ministring Instice to any one. (b)

c.6.0 7. Brit. c.42. c Dierf.301. n. 40. 41.42. f Plowd.92. 114. g Dr. Stu.l.1.

[d]Glan.l.2.

duires also that all Trialls of private Adions (except a few) as to matter of Fact, (f) fhould be determined by a lury of twelve fice, and lawfull men of the same vicinage, who are neither allyed to either Party, (g) of hindred by any just exception. (b)

316.n.3. Bro. 4. Those who are indicted for any capitall Tit. Challenge. crime, or Felony before a Judge, unlesse a-

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ny question arise touching matter of Law, are not allowed Councell. Yet the Laws require That the Judge himfelfe should instruct the hat party in all things appertaining to the form of his defence, left an ignorant Innocency en endanger his life. (i) But in case of an Ap- (i) Fortesc. c. peale, hee may make use of others for his defence. And if he be so poor, that through c.84. Stamf. want he is not able to procure Counfell, the pleas, 1.2.c.63. Judg ought upon his request to affigne him a or Patron to plead for him. (k)

3. As for the fumme in which any one (k) Dr.Stu. ib. supposeth himselfe to be prejudiced, by reaon of a Trespasse committed against him, the Justices doe proportion it either by the rerdict of a Jury, or by vertue of their own Office: (1) For they doe, after that the costs retaxed by a Jury, augment them upon (1) Brac.1.3.]

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6. If the Jurors being fworn, upon their going together, cannot agree upon their rerdict, fo that there be any danger, that they may perish through hunger, because the Common Law prohibits them from eating and drinking without the Judges leave, untill they are agreed together upon their verdid) when any fuch danger appears. The ladge may permit them to eate and drink, and remit them againe to confult; And if at length they can by no means agree, he may, having amerced them, discharge them, and appoint others in their stead (m)

7. We have before mentioned and declared, that that Action which was called Nex- (n) Tit. 8. of

alis Actio, is wholly unknown to us. (n)

27.Dr.Stu.l.2.

tr.I.c.I.

(m) Dr. Stu.l. this Book.

to in this case, wee need not trouble of the felves with Observation concerning it.

8. If in a reall Action , Judgement shall palle for the Tenant, the Demandant find only be adjudged to pay cofts of Suit : But it passe for the Demandant, the Judge stal condemn him to pay Damages, and cofts (6) Scire facias Suit, and shall command the Sheriffe (1 (or in case it touch any Benefice then the

F.n.b. in the Index throughout, and in the Register.

Ordinary) (p) to put the Demandant into possession, which the Sheriffe is bound to doe without delay. And this is true, whether (p) F.N.B.38, the Demandant fue as Heire, or otherwise and whether the Tenant were an Intruder, or not. For if he be a Diffeisor, or forceable Intruder, he is worthy rather of punishment then favour; but if he be not, then the Jury lay little or no Damages upon him. (4)

(q) Brac.1. 3. tr. 1.c.3. 0 5.

9. An Action is chiefly in case of Movesbles; but as concerning Moveables, weenever sue for rhem in Specie (as I said before) but only propose the value. And having proved the thing in Action to be Ours, and the value so much , wee recover either the thing it selfe, or the value. I doe not finde that the Defendant can be compelled by our Law to restore the thing in Action : Yet in the case of Lands, or an incorporeall Right, the Demandant or Tenant may require the view of the thing, if it be out of necessity, and not to protract. In which case the Judg commands the Sheriffe; That at a day affig ned, he cause a view to be taken by such Viewers or Surveyers, as may certific the Cour Court at another day touching the quan-

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10. That which the Komans called Judidumfamilia eviscunda, wee term Partition of an Inheritance: But whereas they divided as wel Moveables as Immovables among Heirs, we only make partition of Immoveables amongst those whom either the Common Law or the Custome of any place intitles to an equall part of an Inheritance. (r) Nowthis (r) Lit. 3.6. partition is made either by the consent of the 1,2. Heirs, or by the Authority of the Magifrate. That which is by consent, may either be so made, that the Estate being divided into equall parts, the Eldest shall have the fift choise, and so the rest in their order, or else by Lots. (s) The forme of that which (s) Id.ib. is by the authority of the Magistrate, we find Terms of the described at large by Bracton and Littleton. Law, v. Parti-(t) In which this is lastly to be observed; tron. That whatfoever is affigued to one in one (t) Brac. L.2.c. place over and above their due, shall be re- 33,34. Lit. ib. compenced to the other in another place. (#)

(u) Brac.c.33.

11. Those who hold joyntly, whether n. 8. they be Joynt-tenants, or Tenants in Com-

mon) cannot be forced by the common Law to make Partition; yet this is changed by an Act of Parliament: (w) wherefore at this day, w 31.H.8.c.1 if Partition be made amongst these, the same 32 H. 8.6.32. rules are to be observed, which we mentio-

x See this title

12. Where either, or any of those, whose Sett. 9. Fees or Villiages border upon each other, defire to make distinctions of their bounds,

ned in cale of Co-heirs. [x]

134.

they may have a Writ directed to the She. riffe, that hee shall determine and bound their limits equally. By the affistance of a Jury of 12 men, the most discreet of the Vici-(y) F.n. b. fol. nage fworn for this purpofe: y) which Partition he shall certifie under his own Seal, & the Scales of foure Knights, who were present at the businesse at a certain day affigned. And if either be unwilling to have their bounds limited, as being the party who happily doth commit the Injury, the other may obtain a Writ directed to the Sheriffe, to require him to fet equall bounds and limits. (3)

(z) Terms of the law, v.perambulation. F. n.b.fol.128.

13. Now what foever shall be adjudged by the Supream power, or the Justices upon fuch certificate to each, that shall immediarely become theirs to whom it is adjudg-

(a) Lit.1.3.c.1 ed. (a)

Of publique Judgements. TIT. XVIII.

S for those punishments which are in-A flicted upon Malefactors, some extend to the loffe of life, some of a Member, others of City, Burrough, or Province, some to perpetuall banishment, or for a time, some to the restraining the body, as by perpetual imprisonment, or imprisonment for a time; fome to bearing, whipping, or the Pillory! Some also to the losse of Dignity and Order, or to a privation or prohibition of any thing. (a)

(a) Brac.1.3. tr. I.c. 6.Flet. 1.1.6.16.

I. Amongst

I. Amongst these, that is reckoned cheif, in regard of its Heinousnesse, (b) which wee (b) Coo.l.4. call Treason. Now Treason (c) is either Beverleys case, High or Petite: High Treason is that which 124. the Romans called Lafa majeffas: and this [be- (c) Flet.l.I.C. fore the alteration of our Government] was 21. diverse wayes committed, as by killing, or imagining the Death of the King, the Queen, or their Sonne and Heir apparant : By ravithing (d) the Wife, or eldest Daughter of the King [if the were unmarried] or the wife of the Kings Sonne and Heir apparant. By taking up Armes against the King within his Kingdome. (e) By adhering unto, or bring- (c) Dyer, foling supplies unto the Kings Enemies. (f) by counterfeiting the Kings Great, or small Seale, or his Coine, or by bringing into 57. the Kingdome wittingly, or putting away any counterfet Coine. By killing the Kings Chancellor, Treasurer, the Justices of cither Bench, Justices Irenerary, or of Assize, or Justices of Over and Terminer, when they fit in Judgement, or are in pursuance of their duty. (g) And to these they added him (g) 25. E.3.6 who being beyond the Seas, stirred up others to invade the Kingdome with an Army. [6]

2. Furthermore, those who by force or feare did fo restrain the Kings power, that he could not exercise his Kingly Authority, or enjoy his Prerogative, were by the opini- (i) 21. R. 2.in ons and Judgment of the Justices and other certain questilearned Lawyers, adjudged guilty of Trea- ons and answ. lon. [i]

3. They ment.

(d) Spec. Juft. 1.1.c. det pecbe de majefte.

98.7.56.

(f) Coo.l.4. fo.

(h) Dyer, fol. 298.n.29.6 f. 300.3.38.

in that Parlia-

Institutes of the

3. They were also deemed guilty of this crime, who counterfeited the Kings Seale Manuall, Signet, or private Seale: Or who did counterfeit, wash, or clip any Forreign Coine which was current in this Kingdome. It They who did either by writing, word, or Act affert the Authority or Jurisdiction of any Forreign Prince, Prelate, or Estate, in Causes Spirituall within this Kingdome, or within any of the Kings Dominions: [1] Those who denyed the Oath of Supremacy upon the second tender [m]

4. Those also were formerly included under this crime, who detained any Castle

k 5 Eliz.c.11. & 14.Eliz.c.3 18 Eliz.c.1.3 H.5.c.5.Flet. 1.1.c.22. 1 1 Eliz.c.1. & 5 Eliz.c.1.

of this Kingdome, or any other of the Kings Realms forceably, any Tower, Fort, Fortreffe, great Guns, or any Warlike Ammunition, and did not deliver them within fixe dayes after by Proclamation, being required. Those who did voluntarily burne any of the Kings Ships, or cause them to be burnt or deftroyed : Or did obstruct any Port or Haven belonging to his Dominions, or cause them to be obstructed or stopped; or did abet, or counsel any other person offending in the n 14 Eliz.c.1 premises. (n) Those who did endeavour to rescue or release any one who was committed to custody, or prison, for Treason against the Kings person, after having been conviacd; Or did divulge, or make publique fuch

o 14.Elizic.2 endeavour by word or deed. (e) But thefe

s. To these may be added those who did draw, intice, or perswade any of the Kings Subjects, or any persons within the Kings

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Dominions from their naturall Obedience with King; Or from the Religion established : Or did absolve them by vertue, or under pretence of any Bull: And being absolved, did reconcile them to the Religion of Sea of Rome. Or those who being reconciled to the Sea aforesaid, did promise Obedience to that, or any other power (p) Those also (p) 23 Eliz. c. who being Subjects of these Realms, tooke 1,13 Eliz, c.2. upon them the Orders of Priefts, Deacons; or Jefuites beyond the Seas, by authority derived from the Pope, or entred into any other Religious Order, and returned into any of the Kings Dominions: Or being Laymen, and brought up in any of the Jesuites Colledges beyond the Seas, from the 5. year of Queen Elizabeth, did not return home by. aday prefixed, and giving in their names to the Diocesan of the place where they lired, or to two Justices of the Peace, did not Submit themselves to Her Maiesty, and take the Oath of Supremacy. (9)

6. He allo is guilty of Treason, who fin- 6. 2. ding another falling into the crime, encou- r Stan. pleas, ageth him, or aflifteth him with help or crown, l. 1. c. Councell; (r) For in case of High Treason 44.

are principalls. (s) 7. But hee that is only conscious and pri- 23. Eliz.c.1. y, not any wayes affifting the Traytors, t 1 & 2 Ph.& hee is not guilty of High Treason, but on- Mar. c. 10. 5 of misprision of Treason, for concealing & 6 Ed. 6.c. the Trayrors. (t) Hee that privately coines 11. 1 Ed.6.c. monyes not current in this Kingdome, in- 12. 23 Eliz.c. curs the penalty of Misprision of Treason, (11) 1. 1. Eliz. c.6. which is also to be understood of those who u 14 Eliz.c.3

(9) 27 Eliz.

s Id.ib. yet fec

[] 14 Eliz. 6. 2. [x] Terms of the Law, v.

will refion.

y 16 H.8.c. 6.10.

[c] Dyer, fol. 230.1.55.

[d] Fulb.para. Seignories, fol. 16,17. Plowd. 391.

e Flet. l. I.c.

did either release, or endeavour to release them that were committed for Treason against the person of the King, or for sulpition of fuch Treason, out of Prilon or Custody. [m] As also of those who take the Kings Great Seal affixed to Letters Patents, and affixe them to others, [x]

8. He that is condemned of Treason, forfeits all which he bath, as well Lands [and those notwithstanding that they be entailed] as Chattels and Rights [7] to the Exchequer, and to the Supream Power for the [2] Plow. 381 most part. [a And being laid upon a Sledg 391. 33 H.8, in ftraw, he is drawn by a Horle to the place of Execution : where, when he comes, he is a 18 Eliz.c. hang'd up by the neck, and let down again 1. 5 Eliz c. 1. to the ground alive: Then is his head cut of by the publique Executioner, his Privites b ing first cut off, which together with his Entralls and Heart are cast into a Fire, and [b] Flet.1. I.c. his Trunck cut into four parts. b] Yet in some cases, They are only drawn and hang untill they be dead. [c And so farre is the very memory of a Traytor condemned, that not only his Head, and the other parts of his Trunck are publiquely fixed upon flakes untill they be devowred by Fowls, or rotand p trific. But even their Isue [if they have any] are in most cases despoiled of their No bility, and deprived of all Priviledges and Prerogatives due unto their Father. [4] Now Women who are convict of Trealon,

are bound to a stake, and burned. [e 9. Misprissen of Treason is punished with the confication of all their Chattels, the

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loffe of the profits of all his Lands duting life, and the Imprisonment of his body du-

ring the pleasure of the Supream Power. [f] [f] Terms of 10. Perit Treaton is, where any doth ma- the Law, v. liciously kill a Subiect, under whose power misprisson.

and subjection the party is, as a Wife her Husband, [g] a Religious person his Prelate, [g] Dyer,253. a Sonne his Father or Mother, according n.103. of fol. to the opinion of some, though others con- 333.n.25. tradict it, [h] a Servant his Master or Mi- (h) Lam. 248. striffe. [i] To these Antiquity hath added (i) 1d.240. others , viz. not only those who killed their cromp. 18. Kinfmen, but even those also, who did by Plow. 260. any capitall deceit, plot any thing against Dyer, 128.n.57

their Effates, Members, or Honours. As 12 H.7.0.7. also those Servants who committed any fuch crime against their Mastes : Or who lay with their Mafters Wives , Daughters, or Concubines, or counterteited their Seals.

(1) Now the punishment due to this crime, (k) Flet.1.1.c. is, to be drawn from the Prison to the place 37. Spec. Juft. of Execution, and there to be hanged by the 1. 2. neck untill they be dead; (1) but's woman (1) Cromp. Iuft. Is punished for this in the case of High Trea- fol. 18. Flet.l. fon. Their goods also are forfeited to the 1.c.37. Exchequer, and their Lands to the Lord

of the Mannor, yet fo as the King was wont to-have a yeare and a day, and wafte. (m)

(m) Stanf. 1.1. 11. The refidue of Capitall Crimes are 6. 2.

comprehended under that one name of Felony. Although Felony in a more large (n) Lamb. 1.2. fignification includes Treason, (n) and is c.7. Plow. 333. fomerimes more friedly extended to Mur- (o) Perk. 349.

12, Of 22 H.S.c.14. der. (0) 5 1

12. Of Felonics, there are some which are against the Common-wealth, and some which are against private persons principally, though by confequence they also are against the Common-wealth, Or the first fort are raising of Devils, Witch-crast, Conjuring, by which any one is killed : Or any other whatfoever after the first conviction , by meanes whereof the body of any party lies fick and languishing, and these formerly went under the name of Felony. (p) But at this day, those who use Invocations, Conjurations, or raising of Devils; or who take counfell of Evill Spirits, make any bargain with them, or deale with them by way of Commerce: Or who do any way command, cheriff, or reward them for any end or purpole. Those who dig up any dead body out of a Grave, or Dormitory, or who draws off the skinne or the bone of any dead body, to ule them in Inchantments. Laftly, those who practice any manner of inchantment, charm, or forcery, whereby any person shall be killed, destroyed, wasted, consumed, pined, or lamed, That luch Offenders, their Aiders, Abettors, and Counfelfors, shall suffer pains of Death as Felons, without benefit of Clergy. And it is further provided for the utter extirpation of such wicked Blasphemy; that whofoever shall take upon them by Witchcraft, Inchantment, Charm, or Sorcery, to tell or declare in what place any Treasure of Gold or Silver may be found, or lies hid: Or to provoke any person to unlawfull love: Or to destroy and waste any ones Cattellor Goods,

p \$ Eliz.c.16.

Goods or to destroy or hurt any ones person, although the same be not effected or done, every such oftender shall suffer a year Imprifonment without Baile or Mainprife, and

once in every quarter of the faid year, shall q 1.7am.c.12 in some market town stand openly upon the r 25.H.8.c.16 Pillory for the space of fix houres, and there \$ 27. Eliz.c. 2. openly confesse their errour. But it being once convicted, they do again commit the offence, they shall suffer death without bene-

fit of Clergy. (a)

13. And hither we may aprly refer, that Sodomiticall fin with bruit beafts, (r) the entertaining of Jesuits & Preists brought up in the Seminaries beyond the Sea, (s) the fefuling of Abjuration by Papists, and their return into England, after having abjured, (t) the afsembling of Rebells, (u) the art of multiplying Gold or Silver, (w) the procuring or caufing of Congregations of Malons to be a embled, (x) the departure of Souldiers, Mariners, ot Gunners from their Captaines, (y) the exportation of Horses into Scotland: (3) the conveying of sheep beyond the Sea, the second time, (a) the return of vagabonds into England having been banished, (b) the cheatings and robbings of those Vagabonds which—call themselves Egyptians. (c) the idle wandring of Souldiers and Mariners, (d) the counterfeiting, or deceitfull using of Letters Testimonialls: [e] the riding in Armes to commit a Felony, [f] the breaking Phil and Mar. or cutting of the bankes in Marshland, (g)

14. And like unto these seem those Felonies which spring from breaking of Prisons,

t 35 .Eliz.c.I.

u I. Mar.c. 12. which Statute is now expired W 5.H.4.C.4. x 3, H. 6.c.1.

y 18. H.6.c.

19.2.and.3. E.6.c.2.4.5.

Z 23.H 8.c.

16.1.Ehz.c.7. a 8.Eliz.c.3.

b 39.Eliz.c.4. c 1.2, Phil. and

Mar. c. 4.5. Eliz.c.20.

d Ibid. 1b. 39.Eliz.

C.4.17, f 25. Ed.3.c.

g 2 and 3.

h Lamb.l.z.c.

Dier, fo. 90.1.

60.fo.165.n.

13.H.S.C. I .

3.c.14.36.E.

R.2.6.8

7.60,228,

10.

60.

as where one is imprisoned for Felony, or for suspition of Felony, and breaks forth; as also where a Gaoler lets fuch a person forth freely which we call a voluntary escape: Or lastly, the affiftance and help in a third person, which we call Refcous, (b) the making, 7. 2.24. 226. bringing into the Kingdome, or felling that kinde of Mony which our Ancestors called Galley Halfe-pence, Suskins, Dotkins, and Blanks, (i) the Imbecilling of a Record, (b) the violent oppressing the Subject by the Kings Purveiours or others, (1) the compel-\$ 8.H. 6. 6.12. 14.5.3.c.3.5. ling of any Prisoner by the Goaler, by dures E.3.6.2,25. E. of Imprisonment and pain to become an Appellor against his will, (m) and thus much 3.c.2. and 4.5. of the first fort of Felonies.

m 14. E.3.c. n Lamb.1.2.c.

15. Felonies which do primarily and cheifly concern private persons, are such as re-flect to the hurt and prejudice of the Body only, or the Body and Goods, or the Goods only. (n) Those which hurt the Body, are such which either take away life, or bring some other enormous injury upon it, though not mortall; those which take away life, are comprehended under the generall name of Homicide, (o) butthis hath diverse appellations and causes from the diverse Intents of the parties offending. For that which is committed through malice prepented, is called murder, (p) and is punished with death. And we Glan.1.11.6.3. are to take notice here, of the ancient custome which our Ancestors used, that he who c.4,n.2.Dier, committed Murder was hanged up alive by 6.69. m. 28. his whole Body upon a Gibber, and was not

di-

9.fo.186.x.3 upon any condition to be let down untill he

o Flet.l.I.c. 23.

p Plow .474.

Lyac.1.3.tr.2.

died through Hunger, but I read nothing of this; and if there were any fuch custome it is long time changed: For at this day they, as other Felons, are strangled with a Halter, and in this only they differ from other Felons, that their Bodyes are hanged up on high in some publick Roade, neer the place where the tact was committed, as an obiect to those which palle by, and are not to be removed until they be confumed. Now there are others who shew more at large how and by what wayes murder may be committed.

a Stan. Pleas 16. And it is murder also where any one Crow.l.1.c.10. kills himselfe. For such a person is called, Fe. Lamb. 1.2.c.7. lo de fe: In which case Christian Buriall is. fo. 230.

forbidden and all the parties Go ds and Chartells are forfeited to the Supream power, r Brac.1.3.tr. to be disposed of to pious uses, (r) yet some I c.31.P.ow. there are, who dift neuth, whether the par- fo.253. ty laid violent hands upon himself through fear of Judgment, or being weary of his life, or through the violence of lome disease : For in the first case, as other Felons, he looseth both his Land and Chattels, in the second, his Chartells only, and in the third he forfeiteth nothing. (s)

17. That which is committed through Sudden passion & Anger, is called simple, t) Homicide or man flaughter, and it is punish t Glan.l. 14.c. able with death alfo; yet such is the commi- 3. feration of humane weaknesse with us, or the pious instigation to learning, that he, who is convict of this Crime the first time, if he can read perfectly, and distinctly, as a Clarke

Flet.1.1.0.36

u 18.Elizo,7:

ought to do, is freed from death, and (his lands and goods being forfeited is only burnt in thehand; by which means he may be known if he commit the like crime again, and committing it the second time, he is to dy without mercy, (u | but so great hath been the bloody wickednesse of these times, that this Law hath been fomewhat more exasperated. For now by an Act of Parliament in K. James his time it is decreed, that he who flabs another who hath never a Weapon drawn, or who doth not provoke him by firicking fift, shall loofe the benefit of Clergy, although there do no precedent malice appear, if the party dy within fix Months, unlete it be done in his own defence, or for the necessary confervation of the publick place, (w) now this favour of Clergy is not only granted to thek, but even to all other Felons, unleffe where it is denied by some particular Act of Parliament, (x) the other kindes of Homicide are not accounted Felony. (v)

18. For every Homicide which is without malice is either necessary or casuall, (z) that which is necessary is likewife double, one which cannot be declined without prejudice to publick Justice, the other which cannot be avoyded without the death of the innocent, an example of the first fort may be given in the cale of killing a Robber or Theife, who cannot otherwife be apprehended, and of the later, in case where one kills another in his own defence, the former is free from all manner of punishment, (a) the later not fimply, for it is materiall, that the party who is flain

Sec

W 1. 7.1.c. 8. x 23.H. 8.c. 1. 25.H.8.c,3, 26,H.8.c.12. y Lamb.1.2. c. 7.fo.248. z weft, Simbol, Fart . 2. fo: 48 49:

2 Stanfolotota

fer upon the parry that kills him in his own Houle, or neer the Ordinary high-way, with a malicious intention to kill or rob him, or in case that he be moved with sudden passion, and purfues the party defending himfelt with an intention to fight with him, lo far untill he can fly no further, for in the one case he kills him without incurring any punishment at all, b)but in the other case, he loseth b IT, E:I,I,

his Goods, (c) nor is he received and taken Mar.c. 12, into grace without the expresse pleasure and Stan,1,1,0,6,7 Indulgency of the supream power, (which e 6 E,1,6,9:

notwithstanding is granted and obtained of

courfe.)

19. Cafuall Homicide is double likewife, one which is meerly through mif-fortune, the other which is mixed also with some fault in the party who kills the other. That often happens in the Lawfull profecution of a lawfull Act, and often from a bruit or an inanimate thing. Of the first kinde, is, where any one is killed, with the fall of an Arme or Lopp of a Tree, or a Tile from a House, after warning given by the parties who are either lopping or tiling, (d) to which also may be d west: Simbol: added, that which may happen in Justs and part, 2: Sec: 50, Tournements, in regard the parties who tit, Indicaments are there in Action are supposed to be making trialls of their strength in the way of freindship. And therefore K. Henry the fecond ordained, that those should be pardoned thereby giving them to understand how much they were obliged to perform for the Kings fake when required. (e) Of the second e Spec, Julic, 1: fort is, where any are fuddenly drowned in I:c:Del Offices

falling del Coroner:

falling from a Ship, Boar, or Bridge, or flain with a Carr, Mill, or the like. In which Cales we have betore related what our Law de-

the Body, and yet deprive it not of life, is

where any one out of malice cuts out the

tongue, either of a man or beaft, or puls out

(f) Fleta.l. I. termines. (f)

fault of the party who kills the other, and yet is caluall or accidentall, is, where one that is lopping of a Tree, or tiling of an houle, happens to kill another with a Lop or Tile,

(g Stanf. Rieas not having given any warning, g) of which Crawn. L.c. 8. kind others draw many examples. (b)

(h) Fla.l. L. c.31.26 H. 8.

c.16.

5 Eliz.c. 17. (i) 25 H. 8.c.6.

\$ Eliz.c. 17. (k) Fleta 1.1.

9.37.

(1) 3 H.7.6.2. Lamb J. 2.6.7. the eyes of any Subject, (i) or commits the horrible and abominable fin of Sodomy with a man, It (but those who committed any kind of Sodomy were used to be butied alive in the Earth (1) (or having stoln away a Widow, Wife, or Virgin, who hath an Estate in Lands or Tenements, or who hath goods, or Chattells, or who is Heir apparent to her Ancestor, and marries her being so stollen away against her will, or commits a Rape upon her; or he who assists (we any one in the committing of such crime. He also where any one hath the cannall knowledge of any

(m) Lamb. ib.

[n]12.H.4. 6.13.Stanf.l.1. 6.14.Glan.l.14

c.6.

[9] 1 Fac.c.11

whether it be with her Will and confent of without: (n or lastly, where any one commits a Rape upon any woman whatfoever;

to these we may also adde him who marries a second Wife in the life time of his fish. (4)

woman who is under the age of ten years old

Now that Felony seems to be of a mixt na-

rute

thre which is committed by him, who having any deadly infectious difease by reason of which he is prohibited by the Law to go out of his house, doth notwithanding go aabroad, and trade, and converse with others. (P)

Pli fac.c.21

32. Felonies which are committed both against body and Goods, are Piracies, Burgaries, Rabbetics of houses, or Castles, Burning of Houses, and Robbery. Now by Piracies we do not onely mean Piraticall robbing upon the Sea, but all manner of Felonies upon the Sca, or within the Jurisdidion of the High Court of Admiralty Burglary is a violent and forcible breaking into a House, either private or Sacred, (as into (Church) in the night time, with an intention to kill, steal, or commit any Felony Indictments. within the faid place; (r) but how far this is extended we are to inquipe thers. (s)

23. Now that which we of our Nation call House-robbing, I do not and cypresied by our Civilians, but it fignifieth a breaking, or entring into anothers house or dwelling place in the day time, and a taking away of Goods, whilft there is some Body present in

the House.

24. House-burning doth not onely extend to Houses and Barnes wherein Corn is laid up ; but also to those heaps which we call Mowes, Stacks, or Reeks, if they be near unto Houses, and burnt though malice. (w)

25. Robbery is the taking away of goods Fulb.fo. 109. from

9727 H.8.c.4 28 H. 8.c. . 5 . [r] west. Symbol. Par. 2.tit. Sec. 56. Dier f. 99.7.58. [s Stanf l.I. c.24. Lamb.fol. 254. Fulb. fo. 104. (00.1.4. Cases of Ap. peals,f.40. (t) 5 E.6. c.9. 39 Eliz.c.15. Lamb.fo. 260.

(u) Lamb, 1,2. c 7.fo.269.270

Flet.l. I.c. 37.

from any ones person, or or least the person who is owner of them, being prefent and not affenting. Now this is sometimes violent, and accompanied with terror, as when any man is robbed by theires on the high way, (w) Dier 224. by which his life is in danger: (w) and sometimes secret and Clandestine, as when

M. 3.

a mans Purseis cut or stoln away against his privity, having in it twelve pence in monies: (x) some also affirm it to be Robbery wherea (x) Lamb.fo. mans Wife is taken or inticed away with her 262,263,264, Husbands Goods, (y)

265,266.

(y) Fleta l.1. c.39.

26. Amongst those Felonies which relate to Goods onely, that methinks deserves to be reckoned first, which we call forging of Deeds, being committed the second time, for he who having been once convict of this crime, and is again found guilty, either of malicious forging, or caufing and procuring others to forge Deeds, or knowingly to alledge or plead them in Judgement, whereby any one is prejudiced, or hurt in his Title to Lands or Goods, is declared guilty of Felony, this being Felony by the Statute. (3)

(z) 5 Eliz.c.14

(a) Lamb. 262

well.p.rt.4.tit.

27. That which is Felony by the Common Law, and relates to the Goods onely, is termed Larceny, and is a fraudulent taking away of Goods moveable or personall, in the abfence and against the will of the owner, (a) of which those Servants are as much guilty, who take away the Goods of their Masters who are dead, from the Executors, and are

Indistment s Sec. 61.

not reclaimed or drawn to restore them after Proclamation made, (b) as those who carry away Goods committed to their Custody by

(b) 33 H.6. 6.1.

their

their masters to the value of forty Shillings, unlesse they be under the age of eighteen years. (c)

28. But Larceny is either Grand or petry; 5 Dliz.c, 10. Grand is where the Goods stoln exceed the 27 H.8.c. 17. value of twelve pence, Petit, where they a- 28 H.8.c.4. mount not to that value, and therefore this is not by some called a Felony. (d) The former (d) Lamb. 267. is Capitall; the latter punishable, onely by Fulb. 101. Flet. whipping and imprisonment.

29. By what wayes, and how Larceny is committed were materiall to understand, wherefore know that under those Goods, by the taking of which Larceny is committed, are comprehended, monies numbred, Vessells of Silver, Garments and Cloaths, meat, (unleffe where the Party that takes it, doth it through necessity, either to save his own life, or his Neighbours) all forts of Grain, Hay, fruit, separated from the ground, Horses, or Mares of any age, Oxen, Cows, Sheep, Lambs, Hogs, Pigs, Hens, Ducks, Peacocks, Turkies, or other tame fowls: and fome things also which are wild, as young Pigeons which are in a Dove-house, and cannot as yet fly, Hawks from their nests, and Fishes from a Pool, or other place which is made to keep them in. (e)

30. Nor is he onely guilty of Felony who 170. takes a Deere which he knows to be tame, Stan.l.1.c. 15, but he also who takes Deere or Conies out of a Park or Warren in the night, or he who hunts them either disguised or armed, if being apprehended and examined, he (f) Lamb. fo. denie the Fact. (f) Lastly, he who shears 271.

(c) 21 H.8 c.7

1.I.c.38.

(c) Lamb. 269?

Wooll

[g] Id.299.

(h) Id.273.

[i] Lamb.1.2.

Stanf.l. 1. c. 17.

(k)Flet. l.t

(1) Id.ib.

(m) Lamb.l. 1. 4.43. Plow. fo.

475. (n) Stanf.1.1.

6.47.

(o) Spec. Justic. 1.1.c.del Office del Coroner, where he

makes nine forts of acceffories.

(p) Stanf. l 1. c.43. Dier fol. 108 u.57.

(q) Dier fo.355

(t)Stanf.l.T.

(s) Fulb.par. Theft, fo. 202. Lamb. fo. 295. Wooll from the backs of Sheep, or flaies of the skinnes, leaving their carcasses behind them, (g) or takes Apples or any other fruit separated from the Trees, or takes a Tree, which either himself or another cut down from the Owner, with an intention to steal it, is guilty of Felony. (b)

31. A man mayalso commit Felony & thest upon that which is his own; as where I lend Vessells of Gold, &c. to another, and fraudulently steal them from him again, (i) or if I receive my own Goods which were stoln, without the Authority of the Magistrate, (k)

and being bribed, forbear to profecute. (1) 32. In Felony, (m) there are also sometimes some besides the principalls whom we call accessories, no lesse guilty of Felony then the principalls, and those not onely by the Common Law, but by the Statutes allo. (1) Now there is a double kind of accessory, one Before the fact is, where any one commands or incites another to commit a Felonious Ad, which he doth afterwards perform: and this albeit, that the party who fo incites be not present at the Fact committed, [o] and the circumstances which in this Case render a Principall or an Accellory onely, Our Lawyers do with a great deal of Art and Judgement demonstrate. [p] Accessory after the Fact, is, where any one wittingly, or ignorantly [q] receives, cheritheth, affifteth, and comforteth a Felon; [r] or who receives stoln goods to keep them, or to dispose of them, together with the Theife.[s Burn Wife

in

c,

n

r,

who in this case conceales the secret of her Hashand is exculable through the necessity of her Duty', (1) which is also true, in case t Stanf.l.t.c. thee commit the Fact upon his command. 46. (w) And there are also Accessories of Acces- u Id. ib.c. 19: fories, as where any one doth wittingly receive the Accellory of an Accellory. (w) w Id. ib.

33. The punishment due to Felons both principalls as Accessories, is to hang by the neck untill they dye, and to forfeit their Goods and Lands, if they have any: (x) x 24 H.8.c.45 Only here is the difference; That the Accel- cood. 4. Beverfory cannot be punished before the Princi- leys cafe, 124. pall be convict and Attaint. (y) Now the y Stanf. 1.1.c. Lands escheat to the Lord of the Mannor, 43. Plow. 97. who notwithstanding was formerly compel- Dyer, fol. 120. led to expect, untill the King had received n. 10. his yeare and his day, and waste, unlesse the King himfelfe vere Lord. (2) Moreover z Stanf. 1.3.c. the Islue of Felons is so infected, that they 3. Flet.1. r.c. are excluded from all hope or possibility of 28. Succeeding in the Inheritances of their Anceftors, which otherwise should have de-Icended to them, unliftle there be any thing more favourably enacted in case of any particular crime, contrary to the common and ordinary forme. (a)

34. But these things which wee have spo- 12. ken concerning the punishments of Treatons and Felonies, must have their distinctions, & therefore it were requisite to explain them b Stanf. 1.2.c. Now the way of impeaching any of thefe 52,53,54,55, crimes is double; one by Appeal, (b) the other 56,17,58,59.

2 I Mar. c. 14 I fam.c. II.

c 1d. c. 59.

Power. (c) If they proceed by way of Appeale, and that it be an Accuser, who takes upon him the proofe of the crime, it is at the election of the Defendant (unlesse hee will confesse the fact) to wage his Battaile with the Appellor, or to be tryed by his Country. Or (in case he were a Peer of the Realm) to be tryed by a Verdict of his Peers, or Pares, (d) But it he be indicted, he is lest solely to the tryall of his Country, or Peers. And if in either case he be convict, he is punished with Death.

d Id.1.3.6.1. Flet.1. 6.21. 31,32.

> 35. But it sometimes happens that the party accused through contumacy, refuseth to be tryed either way, but either stands mute, or pleads not fo: As by his answer Islue may be joyned to come to Tryall. In which cases, if it be by Appeale, he is immediately adjudged to dye. (e) If by Indictment, then is it taken Pro Confesso, in cale of Treason. And in cases of Felony, he shall be impressed, viz, he shall be committed to the Prison from whence hee was brought, where he shall be carryed into some low dark place, and being stripped naked, he shall be laid upon the bare ground, his Pudende only covered, and his Arms and Legs pulled out by four ropes, fastned to the four corners of the room, hee shall be stretched out upon his back: Then being bound in this manner, hee shall have so great a weight of Iron or Stone laid upon his Breast as hee is able to beare, without confusion. The day following

e Dyer,441.n.

he shall have to crusts of barly bread without drink; next day to that he shall have three draughts of the water next to the Prison, (povided it be not running water) but without Bread : And fo by turns he shall be fed with bread or water every day untill hee dye through the extremities of weight, hunger, and cold. (f)

(f) Flet. l. I.c.

36. Now a Woman who is condemned Stanfil. 2. c. 60: for any the aforesaid Crimes, if the be with Dyer. 241, 14 Child, hath the Execution of Judgment de- 40. ferr'd untill shee be delivered of her Infant. (g)

(g) Flet, l, I a:

37. There is also a milprision of Felony; As in case any one knowes another to have committed Felony, and doth not discover it unto the Supream Power, or to a Magistrate. (b) Now the punishment for this crime, is, (h) Termes of That the party shall be committed to prison, the Law, v. untill hee have put in Security for the pay- misprisson, ment of fuch a Fine as the Judges shall im- cromp. fol. 39. pole upon him before whom he is convened, (i) And it is to be observed; That in all (i) Id. ib. Treasons and Felonies, there is a misprision of Treason or Felony comprehended. therefore it is in the power of the Supreame Power (if in its clemency it thinks good fo to

doe) to suppose him guilty of misprision only, who really is guilty of a greater crime. (k) (k) Id. ib.

38. Next to these which are capitall, are those crimes which used to be punished with perpetuali Exile and Banishment : As those

(.T. ...

perions, who having committed Treason or Felony , and taken Sanctuary , were acostomed, having confest their crime before the Coroner, to abjure the Realm, and (1) Stanf. 1.2. thereby avoid a greater punishment; (1) but e.38,39. Terms this is long fince altered. (m) And indeed of the Law, v. there are few Facts at this day subject to Abiuration. this, and many even of those are not fo (m) 21 H.8.c. high : as he who kills Deere, and cannot 2. 22 H. 8. cap. finde security to put in for the payment of 14. 33 H. c. the Fine imposed, is compelled to abjure the Common-wealth , (n) which also heeis (n) Charta de bound to doe who marries a Woman-Heir, Forest. c. 10. having stollen her out of the custody of her Dier, fol. 238. Guardian, and is not able to fatistic for the N.34. value of her Marriage. (a) So also hee who (0) 13 E. 1 c. accepts of a Benefice, being elected by the Pope. (p) And lastly, 2 Papist who resuseth (P) 13. R. 2. to come to Church according to Act of Pat-Stat . 2.6.2. liament, (q) (q) 37 Eliz.

alty upon those who sue or implead any one in a Forreign Kealm, when the Action belongs properly to the Cognisance of our Courts, or where Judgement hath in the same case been given by the Justices here. As likewise upon those, who by prosecuting a Plaint in another Court, endeavour to retard or impeach Judgment given in the Supream Courts of our Supream Power. For such Offenders being summoned by distresse, either upon the Lands in question, or upon any

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any other of their Lands, to be made by the sheriffe to appeare personally in the Chancery, or in either Bench, or before Justices particularly for that purpose deputed tolanswer such contempt if they appeare not. Then are they, their Procurators, Attorneys, Executors, Notaries, and Summoners deprived of protection, their Lands, Goods, and Chattels forfeited to the Supream Power, and their Bodies wherefoever found and taken, kept in Prison untill they have paid a Fine to be imposed upon them at the will and pleasure of the Supreame Power. (v)

40. Those also are lyable to this, who manire. 10. leeke for any prefentations to Churches, Prebendaries, or other Ecclesiasticall Benefices from Rome : Or who fecke and obtaine any Procedle concerning the premisles, any Excommucations, Bulls, or other Inftruments from thence. Nor they only, but their Procurers, Executors, Notaries, Summoners, Promoters, and Affifters, (s) So also those who procure any Provisions from the Pope, by which they (5) 13 R.2. C. become absolved from their Obedience, or 2. obraine any Office in any Religious Houles Ge. (t) As Arch-bishops, Bishops, Abbors, who paid a greater fumme then usuall to (t) 2 H.4. c.3. the Pope for their Benefices, (") together with those Rectors and Vicars under (u) 6H.4.c.1, the Jurisdiction of the Arch-Deacon of Richmond, who impose roo great exaction's upon the Subject. (w)

(r) 27 E. 3.C. I . Bro.tit. Pra-

(W) 26 H.8

41. To 14.

Institutes of the

41. To which wee may adde, those who defend or promote any Authority or Jurisdiction of the Pope (which hee shall claime in ENGLAND) either by word, writing, or Act : Or those who shall alfift, help, or comfort any manner of way any person or persons who shall defend or promote the same. (x) Those who en-

x 9 E.iz.e. 1. 28 H.8. c. 10. 1 Elik, 6.1.

tertaine or affift any who shall bring any Bulls, Writings, or Instruments of Ab-Solution or Reconciliation from the Sea of ROME, or from any person exerci-fing the Authority of the said Sea: Or who shall under such colour absolve or reconcile any person, or who shall accept of any fuch Absolution. Lastly, thole who shall bring over from the Pope or See of ROME, or from any one claiming his Authority, any Agnus Dei, Crotles, Pictures, Beads, &c. and shall deliver them to any Subject here, or procure them to be delivered or offered, to the end that they should make use of them. And those also who shall receive any such thing being offered, and not apprehend the person offering them, or not deliver him to the Ordinary, or some Justice of Peace within three days, together with the thing y 13 Eliz.c.2. fo received. (y)

42. They also come under the same notion, who being compellable, refuse the Oath of Supremacy, being lawfully tendered. (3) Or who doe directly, or indireally

Z 1 EUZ.6.1. 7 Eliz.c.1.

really give any money, or fustenance, or any other thing to any Jusuite or Priest remaining in any Seminary, or to any other Prieft, Deacon, Religious, or Ecclefiafticall person, or to the maintenance of any of their Seminaries or Colledges beyond the Seas. (a)

a 27 Eliz.c.2.

43. And laftly, Those who take or procure for Usurers by way of Usury, though under the notion of any Sale or Contract, above a tenth per annum. [b] b 19 Eliz.c.8. But some of our Lawyers through gaine or ambition, have too violently extended this strict punishment, by stretching the words of one Statute [c] which are e 16 R.2.c.f. meant in the generality, to every light offence of Judges [especially Ecclesiasticall] [d] to whom I shall only say: That that d Cromp. fo. 52 Candor of some were to be defired, and that Ignorance of others lamented, which a very learned Man did lately most accurately perswade and refute. [e] c Colmus, part 3.c.7 fol.85.

44. Those Crimes which are punished with the losse of Protection are not to bee escemed light. Now they incur this, who being five times lawfully fummoned in a full County, doe not give their appearance to a personall Action or an Indictment, [f] for they are pronounced Ur-f 13 E.1.c.35 lawed : And if it be a civill Action , they 31 Elizeap. 3. forfeit all their Goods and Chattels, with the profits naturally arising from their Lands.

tures, 30.

(h) Terms of the Law, v. Wilaw y.

3.C. TI.

(1) 8 Eliz. c. 13.

(g) Bro. forfei- Lands. [g] And if it be eriminall, then tures, 30. they forfeit all their Lands and Tenements also to the publique Exchequer for ever, (b) and are ipfo fatto, deprived of the bene fit of all Lawes, and of the priviledge of Subjects, fo that according to the Ancients any one might kill them unpuni-(i) Brac.1.3.tr. shed. (i) But this Law being altered, (1) they are now referred to a pecuniary (k) 5 Eug. c. Fine. Those also are liable to this punishment, who remove, or throw down the Sea-marks, by which Marriners are fecured from wandring, and directed to their Port, if the Offenders be not worth a hundred pound, whereby they may with moneyes farishe for their offence. (1)

(m) Termes, v. Attaint.

(n) Fleta:

45. Periury committed by any person who was of a Jury in any Court, was fo odious to our Ancestors, that it was decreed, that all fuch Offenders should have their Medowes and Gardens digged up, their Houses pull'd downe, their Woods extirpated and grub'd up, and all their Lands confilcare. (m) And moreover (according to some) they were io be committed to Prison, and for ever rendered so infamous, that they were deprived of the benefit of the Lawes, and their Testimonies never to be admitted in any Caufe. (#)

46. Those who committed periury in any Court were fined twenty pound, and Suffered Leaner.

suffered fixe moneths imprisonment without Baile or Maine prize, and made incapable for ever after of bearing Withels

in any Court of Record.

And if any person did procure or Suborn another to commit periury in any Court, hee is to be fined forty pound: And if hee have not so much in Goods and Chattells, he is then to fuffer fix months imprisonment without Bale, and to stand in the Pillory in the fame Towne, or in fome other in open Market for the space of an houre, and furthermore is made uncapable for ever of bearing Wirnesse in any Court of Record. (0) But periury (0) 5 Eliz.c.9 was wont frequently to be punished with en extraordinary Censure in that Honourable Atlembly of Peeres in the Starr-Chamber. (p)

(p) Dyer, fol. 242.71.53.

47. Next to this are those Crimes which were punished with dif-membring, or Mutilation of the Body : As the cutting off the hand (q) of him who prelumed to (q) 33 H. 3.c. strike another within the Verge of the 12. Court of the Supreame Power. The loffe of his Eare, who maliciously struck another with a Wcapon in a Church or Church yard, or who prefumed to draw a Weapon for that end. (r) And if the (r) 5 E. 6.c.4 person so offending happened to want his Eares, then was hee bu nt with a hot I-ron in the Checke. But this punishment was sometimes joyned with another; for those

those who did either bring, send, or receive others to bring, send, or receive any Sheepe or Lambs alive into a Shippe, to conveigh them beyond the Scas, had their Goods confiscate, and loft also their left Hands for the first Offence. (s) And (s) 5 Elize.3. lett Hands for the Punishment was inflicted for want of Goods, and Chattells to fatisfie a Pecuniary Mulct. As those, Butchers, Brewers, Bakers, Poulterers, Cooks, Coster-mongers, or Fruiterers, who conspire not to tell their Victualls, but at a certaine Rate agreed amongst themselves, or oblige themselves to it by Qark or Promife made amongst themselves, and have not forty pounds to pay for such Offence, they are to be punished with the lote of one Eare, and are for ever rendered infamous in the Eye of the Law, to which Punishment those Mechanicks, and Labourers are Subject, who agree amongst them-felves not to fell their Wares, but at fuch a Rate which they fer amongst themfelves, or not to worke, but at appointed times, or not to exceed fo much work in a Day, or not to finish a Work which another hath begun. (*)

(t) 2 E.r. 15.

Now, those who disperse salse Rumours against Peeres, either by word or writing, to their prejudice, may in some fort be reckoned

may be committed to Prison, untill they produce those whom they pretend to be the first Authors of such Rumours, nor shall they scape publick Justice. But without doubt, those who maliciously do committany such oftence against the Supream Power, are to be punished by the Magistrate. (u)

(u) See the Statutes cited 1.3, title injur.

49. Now of this rank also are those, who 1.3. title injur. malitiously forge, or cause and procure others to forge any Instrument or Writing to overthrow oh call in question any ones Free-hold or Inheritance, or to subvert any ones Right to a Fee or Copy-hold: or do wittingly plead or produce in Triall any luch Instrument to any such end, for such offendors shall forfeit treble Damages and Costs totthe Party grieved, and shall be adjudged to have an ear cut off, standing in the Pillory, as also to have their noles stir, and to be stigmatized as an eternall mark of fuch falshood and Villany: and lastly they shall forfeit the Revenues of their Lands for life, and fuffer Imprisonment for ever ; but they who forge, or procure any one to forge any fuch Deed, orplead ill to overthrow or question the Right which another hath to Lands for Term of life, or an Annuity, or who forge, or cause others to forge any Obligation, Acquittance, or a Release, or any other fuch like personall writing, out of malice, shall pay to the party grieved double Costs and Damages, and shall also stand in the

years imprisonment without Bail or mainprise. (w) next to which are those who cheat any one of money, by forged, and counterfeit Writings, the punishment of which is arbitrary: as are also many other oftences, which many of our Authors men-

14.Dier, 188. n.51.312.n.26

(w) 5 Eliz. c.

tion. (x)

2 33 H.S.c. 1. 50. Nor can I here omit those Assemblies against the publick Peace, which are called Routs, Riots, and unlawfull Assemblies: but as for the Differences, Definitions, and Distinctions of them, shall, (for brevities sake) refer you to others. (y)

(y)Dier, fo. 188

51. To which I may adde the Extortions of under-Sheristes, and their Officers. Now Extortion is defined to be an unlawfull exacting of money which any any one shall do or practise under colour of his Office, (2) and this is sundry wayes punished according to the quality of the offence, (4)

(z) Lamb. 1.2. e. 5. fo. 179. Crompton fo. 53

8 H. 6.6.9. (a) Lamb.ib. 6.4.f..414.

Cromp.fo. 48.
(b) From the French word
Barateur.
[c F.n.b. 171,

172.

s2. Those maintenances also, which are used for the impeding of sudgement, are to be accounted in the number of publick Crimes, for Maintainers and Barretors (b) who are Common somentors of Suits, and Champarters, (c) who prosecute other mens Suits at their own Charges upon an Agreement for the thing in Action, and all unlawfull desenders of personall Actions

(fuch

(fuch as Imbraceors) (d) have punishment ordained for rheir offences. (e)

53. To which pack of Knaves, we may (c Lamb.4.24. adde Adulteries, [f] who formerly were for Cromp. 82. and the most part purged by Canonicall Penance: 155. Flet. 1.2. Thut this Crime is by a late Act of this pre- 6.36. Dier 95. fent Parliament deservedly made Felony, 7 n.39. 6 fo. Usurers, (g) although these also if they ex- 52.n.6.33. H. acted above ten pounds per Centum, per An- 8.c.9. num, were subject to Ecclesiasticali Cen- (f) 32 H.8. fures, (b) Monopolizers, who were called 6.10. 18 Eliz. Ingro ers, Fore-stallers, and Regrators, 6.3.27 Eliz. (i) and many others who are punishable by c. 11. Dier, fol. Imprisonment and the Pillory, and some who are punishable also with many of the aforesaid punishments joyned together: but so great an Enumeration would not 6.3. rightly, or aptly correspond with the Brevi- 27 Eliz.c. 11. ty, which is required in the nature of Institutes or Institutions, wherefore I shall leave them to the more large Discussions of others, and shall onely make it my Prayer, that fince these Labours of ours Ed. 6.c.21. are by Gods Mercy finished, they may Lamb.1.2. c.4. prove ulefull, and gratefull to those, for fo.432. Cromp. whose Leasures and vacant Houres, we in- fol.69. tended this as a Recreation.

(d)Id. 171. A,B,C. 106.2. 22. (g)32 H.8.c. 10. 18 Eliz. Dier ib. n.23. (h) 13 Eliz.c. 8 (i 5 Ed.6.c,14 & 15.45°5